83-958

NO._____

IN THE SUPREME COURT

of the

UNITED STATES

October Term 1983

PORT OF TACOMA
Petitioner,

vs.

PUYALLUP INDIAN TRIBE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the historical dependence of an Indian tribe on migratory salmon in a navigable river overcome the presumption against conveyance of river beds by the United States?

2. Under Article IV § 3 of the Constitution, can the President convey an interest in public lands by executive order?

3. Is the Puyallup Tribe, organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, the legal successor in interest to an interest in land conveyed by an executive order in 1857?

4. Is the State of Washington a necessary party to an action to quiet title to the former bed of a navigable river in the State?

5. Under Washington law, is land exposed by channelization of a navigable stream deemed to be accreted to adjoining uplands?

6. If the answer to the preceding question is doubtful, should the District Court have certified to the Supreme Court of Washington a question as to the Washington law?

LIST OF PARTIES INVOLVED

The parties to this litigation are the Puyallup Tribe of Indians and the Port of Tacoma. The State of Washington and the United States of America are involved in that petitioner has asserted that they are necessary parties and should have been named as defendants.

A companion case, decided on the same day is *Muckelshoot Indian Tribe v. Trans-Canada Enterprises*, 713 F.2d 455 (9th Cir. 1983). A petition for certiorari has been filed in that case.

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The Port of Tacoma, a municipal corporation of the State of Washington, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

This case is reported at 717 F.2d 1251 (9th Cir. 1983).

JURISDICTION

The Ninth Circuit denied Petitioner's petition for a rehearing *en banc* in this case on September 14th, 1983. This petition for certiorari

was timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS AND TREATIES INVOLVED

Treaty of Medicine Creek, 10 Stat. 1132.

Text is set forth in Appendix A.

Executive Order of January 20th 1957, 1 Kappler 920.

Text, including recommendation it effectuated, is set forth in Appendix B.

STATEMENT OF THE CASE

The aboriginal inhabitants of the basin of Puget Sound and its tributary rivers, in what is now the State of Washington, were known as Coast Salish. They did not have tribes or chiefs, and lived in villages consisting of several families, which were situated along the rivers and streams. They subsisted on salmon from the rivers, as well as berries and other foods which they collected during the summer months during migratory food-gathering expeditions.

On December 26th 1854, the Treaty of Medicine Creek, 10 Stat. 1132, was entered into by Isaac Stevens, acting for the United States government, and Indians designated by him as representatives of various bands and groups of Coast Salish from the southern Puget Sound region. The government negotiators called one such group the Puyallup Tribe. [1] Article III of the Treaty assured to the Indian signatories "the right of taking fish, at all usual and accustomed grounds and stations . . . ." (Appendix "A"). Such right to take fish included fishing both inside and outside of several reservations which the same treaty established by Article II. The Puyallup reservation so created was not on or adjacent to the Puyallup River. It, and a reservation allotted to the Nisqually Indians, were unsatisfactory to the recipients, resulting in violence and in several killings.

At a meeting at Fox Island between government and Indian representatives in 1856, Governor Stevens assured the Indians that they

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1. By Article I of the Treaty, each of the Treaty Tribes relinquished to the United States all right, title and interest to the certain lands, including the land in issue.

would be given a new reservation on the Nisqually River and "One large Reservation on the Puyaloop." Following appropriate recommendations from the Commissioner of Indian Affairs and the Secretary of the Interior, President Pierce on January 20th 1857, set aside a tract, through which the Puyallup River flowed, as a substitute reservation for the Puyallups. (Appendix "B"). Parts of the reservation had been claimed by settlers under the Oregon Donation Act, 9 Stat. 496 (1850), but since the settlers' titles had not yet been confirmed by patent they were expelled without compensation other than for their improvements.

Washington was admitted to the Union in 1889. During the late 19th century all but two small tracts of the reservation land had been allotted or sold for the tribe by a commission created by Congress for that purpose (27 Stat. 633). That land, including all the up-land abutting the river, passed into private hands. Also during the late 19th century the Puyallup Tribe designated in 1854 by the Treaty negotiators languished, so that by 1909 the United States District Court for the Western District of Washington determined that it had been "disintegrated by the formal enfranchisement of its members." *United States v. Ashton*, 170 Fed. 509, 511 (1909). The tribal entity which brought this action was created following passage of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, *et seq.*

In 1918 the voters of Pierce County established the Port of Tacoma, a publicly-owned municipal corporation which owns and operates extensive marine terminals, warehouses and related facilities, and which leases space to industrial tenants. Directly and indirectly, it is a major source of employment and tax revenue in Pierce County.

In 1854 and continuing into the 20th century, the Puyallup River was migratory, changing its bed annually or seasonally. In this century local and federal projects have diked it, permitting use of former river bed tracts for homes, industries and farms. The part of the river involved in this case was channelized between 1948 and 1950 by the Corps of Engineers, without objection from the Puyallup Tribe. The Port of Tacoma is the owner of what were before the channelization, adjoining uplands to a bend in the river. Following the channelization the bend became dry land and has since been treated by the Port as accreted to its adjacent property. The exposed tract, consisting of approximately 12

acres, has been leased by the Port to its industrial tenants during the intervening years. It is physically separated from the channelized river by a road-topped dike, title to which is in the Corps of Engineers.

This suit was filed in 1980 by the Puyallup Tribe, seeking to quiet beneficial title in itself to the exposed former river bed and to expel the Port from it. The District Court concluded that in creating the reservation the United States had intended to convey beneficial title to the bottom of the Puyallup River, that plaintiff Tribe is the legal successor to the grantee under that conveyance, that neither the State of Washington nor the United States of America are necessary parties to this litigation, and that Washington law did not divest plaintiff of its beneficial title when the river was channelized. The Court denied the Port's motion to certify the issue of Washington law to the Supreme Court of Washington pursuant to R.C.W. 2.60.020.

On August 15th 1983, the Ninth Circuit Court of Appeals affirmed the District Court's judgment. The decision is reported at 717 F.2d 1251 (1983). On the same day the Court decided the companion case of *Muckleshoot Indian Tribe v. Trans-Canada Enterprises*, 713 F.2d 455 (9th Cir. 1983).

The petition for rehearing in this case was denied by the Court of Appeals on September 14th, 1983.

REASONS WHY WRIT SHOULD ISSUE

1. ***Montana v. United States***, 450 U.S. 544, 67 L.Ed. 493, 101 S.Ct. 1245 (1981).

In *Montana v. United States* this Court addressed the question of whether the United States conveyed beneficial ownership of the bed of the Big Horn River to the Crow Indian Tribe by the 1851 and 1868 Treaties of Fort Laramie. In holding that it did not, and that title to such submerged lands passed to the State of Montana on her admission to the Union, this Court stated the following doctrine:

> "But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon*, *supra*, at 14, 79 L.Ed. 1267, 55 S.Ct. 610, it will not be held that the United States has con-

veyed such land except because of 'some international duty or public exigency'. *United States v. Holt State Bank*, 270 U.S. at 55, 70 L.Ed. 465, 46 S.Ct. 197. See also *Shively v. Bowlby*, *supra*, at 48, 39 L.Ed. 331, 14 S.Ct. 548. A court deciding a question of title to the bed of a navigable water must therefore, begin with a strong presumption against conveyance by the United States, *United States v. Oregon*, *supra*, at 14, 79 L.Ed. 1267, 55 S.Ct. 610, and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain', *United States v. Holt State Bank*, *supra*, at 55, 70 L.Ed. 465, 46 S.Ct. 197, or was rendered 'in clear and especial words', *Martin v. Waddell*, *supra*, at 411, 10 L.Ed. 997, or 'unless the claim confirmed in terms embraces the land under the waters of the stream', *Packer v. Bird*, *supra*, at 672 L.Ed. 819, 11 S.Ct. 210." *Ibid.*, 450 U.S. at 552, 667 L.Ed.2d at 502, 101 S.Ct. at 1251.

The foregoing language from the *Montana* decision is controlling here because:

(A) The Puyallup Tribe's complaint states that the river bed was "reserved" by the Tribe in the Treaty of Medicine Creek and President Pierce's 1857 executive order. In the *Montana* case this Court pointed out that the Medicine Creek Treaty is "virtually identical" to the 1868 Fort Laramie Treaty in describing the nature of the reservation. *Ibid.*, 450 U.S. at 560, 67 L.Ed.2d at 507, 101 S.Ct. at 1256. That "virtually identical" language was there held to impute no intent by the government to convey the river bed.

The Courts here have held that the Medicine Creek Treaty imputed an intent diametrically opposite to that found in this Court in the "virtually identical" language of the Fort Laramie Treaty in the *Montana* case, *supra*.

The Court of Appeals below broadly held that the rule of construction expressed in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 25 L.Ed. 617, 90 S.Ct. 1328 (1970), that treaties with the Indians must be interpreted as the Indians would have understood them, overcame the *Holt State Bank* presumption whenever certain general conditions arguably common to most Indian reservations in coastal or riverine areas were met:

"[W]e conclude that where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the

> grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant." (emphasis added). Opinion at page 13.

In arriving at this resolution of *Choctaw Nation* and *Montana*, the Court of Appeals disregarded the peculiarity of the historical circumstances behind the treaties at issue in *Choctaw Nation* which were delineated by this Court to distinguish that case in *Montana*, 450 U.S. at page 555–556 n. 5, *i.e.*, that the Choctaw Tribe had been repeatedly dispossessed by settlers and the government of lands solemnly promised to them before the treaties and the government promised them in the treaty that "no part of the land granted to them shall be embraced in any territory or state".

As well as the absence of circumstances similar to those considered in *Choctaw Nation*, the Court of Appeals below further disregarded the presence of a key promise made to the Puyallup Tribe without analogy to those considered in *Choctaw Nation*, to-wit, the promise in Article III of the Treaty of Medicine Creek of access to and use of all usual and accustomed fishing grounds and stations, regardless of whether they were incorporated in a future state or not. This Court has consistently held that the Puyallup Tribe's right to fish on the reservation is grounded in this Article III provision, independent of the land grant in Article II. See the *Puyallup Tribe v. Washington State Game Department* cases: Puyallup I, 391 U.S. 392, Puyallup II, 414 U.S. 44, and especially Puyallup III, 433 U.S. 165 at 174–175.

These very different circumstances behind the Treaty of Medicine Creek completely distinguish this case from *Choctaw Nation*. The Court of Appeals holding that the general condition of tribal defendants as fishing *requires* construction of a grant of reservation land around a navigable water to include the bed of that water contradicts the attention to historical circumstances which is the true ground of this court's opinion in *Choctaw Nation* and would emasculate the *Holt State Bank* presumption in all coastal or riverine areas.

(B) The Ninth Circuit Court of Appeals is itself divided on the effect of the Montana decision on the *Choctaw Nation* case, *supra*.

In the *United States v. Aranson*, 969 F.2d 654 (9th Cir. 1982), the Court of Appeals considered the impact of the *Montana* decision on the teaching of *Choctaw Nation*, stating as to its own earlier opinion:

> "We nevertheless construed the ambiguity in favor of the Tribes—an approach *Montana* rejects." *Id.* at 664.

An opposite result was reached in the case at bar, where a different panel of the Ninth Circuit Court of Appeals described the impact of the *Montana* decision on the *Choctaw Nation* case as follows:

> "Nor did [the Montana decision] gainsay the equally important proposition set forth in *Choctaw Nation* that 'treaties' with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor'." *Puyallup Tribe v. Port of Tacoma*, *supra*, at 1257.

The distinction is critical, since at the Court panel in the *Aranson* case stated at footnote 7, page 664, the "inexact and ambiguous" treaty language in the *Choctaw Nation* case was "similarly vague" to that in the *Montana* decision ,where it was deemed insufficient to impute an intent to convey the river bottom. In the case at bar, on a record which is silent on the issue of intent, the Court panel resolved the question of intent in favor of the Indians. *Cf. Barsh & Henderson, Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States*, 56 Wash. L.Rev. 627 (1981), cited in the *Aranson* case at footnote 7, page 664. The authors, writing as advocates for the Indian position, there concede that the *Montana* decision overruled the *Choctaw Nation* and other cases since "in none of those cases were the submerged lands expressly named in the conveyance or treaty". *Id.* at 682. Such lands were not named or referred to in the case at bar.

(C) The principal ground on which the courts below distinguished the *Montana* decision is that fish were important to the Coast Salish diet, whereas the Crow Indians involved in the *Montana* case did not eat fish. (but *cf. Montana v. United States*, *supra*, 450 U.S. at 570, 67 L.Ed.2d at 513, 514, 101 S.Ct. at 1260 (dissenting opinion)).

While fish were a major part of the Coast Salish diet, that fact is irrelevant to land title. The fishing rights created by the Medicine Creek

Treaty were and are exercised throughout the waters of Puget Sound and its tributary rivers, the beds of which are owned by the State of Washington or its grantees. *Cf. Puyallup Tribe v. Washington Game Department*, 433 U.S. 165, 53 L.Ed.2d 667, 97 S.Ct. 2616 (1977). They existed in the waters of the Puyallup River following execution of the Medicine Creek Treaty in 1854 and creation of the reservation in 1857. The fact that the Indians fished in such waters is not a reason to impute to the President an intent to deed them the subadjacent river bed, any more than to deed them the beds of all other waters in which they fished. This is especially the case in view of the migratory nature of the river. If the Tribe claims ownership of whatever bed the river occupies at a given time, it cannot consistently claim the tract at issue here, which has been dry land since 1948.

Finally, we submit that a rule would be unjust and unworkable, which would make land titles depend on the proportions of fish in the diet of the former Indian inhabitants of an area. The infinite variety of such diets, the difficulty of ascertaining the fish consumption of each Indian group, and the arbitrary nature of whatever proportionate amount is determined to be decisive, all militate against adoption of any such doctrine.

2. **The 1857 executive order conveyed no interest.** Creation or enlargement of an Indian reservation by executive order conveys no title under Article IV § 3 of the Constitution. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103, 93 L.Ed. 1231, 1247, 69 S.Ct. 968, 979 (1949); *Sioux Tribe v. United States*, 316 U.S. 317, 86 L.Ed. 1501, 62 S.Ct. 1095 (1942). This doctrine has been specifically applied to the Puyallup Reservation. *United States v. Ashton*, 170 Fed. 508, 519 (W.D. Wash.), where the Court held that "the executive orders making a reservation of public land for use by the Indians were not irrevocable, nor in any sense a grant of title". The subsequent history of allotment or sale as excess of all of the surrounding land demonstrate the intent of Congress that all Puyallup lands other than those required for allotment be disposed of. That "jurisdictional history" suggests this Court's observation in Puyallup III that the contention that the bed of the Puyallup River is retained in trust status is "at odds with the otherwise uncontradicted finding below". 433 U.S. at 174 n. 12.

3. **Plaintiff Tribe is not in any chain of title.** The Plaintiff, an entity created in 1935 under the Indian Reorganization Act of 1934, 25 U.S.C. § 476 *et seq.*, asserts that it is the legal successor in interest to persons who were grantees under the 1857 Executive Order. It adduced no instruments of conveyance from anyone. It relied on this Court's recognition of it, for the purpose of litigating treaty fishing rights, as the successor to Indian signatories to the Medicine Creek Treaty. As this Court simultaneously pointed out, however, fishing rights are limited to Article III of the Treaty. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 395, fn. 1, 20 L.Ed.2d 689, 88 S.Ct. 1725, 1726 (1968). We are here concerned with land title, which is claimed to be vested in a specific entity. To prevail, that entity must demonstrate a chain of title from the 1857 executive order. It has not attempted to do so.

4. **Washington law, which is controlling, is to the effect that land exposed by channelization accretes to the adjoining uplands.**

(A) This Court held in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 38 L.Ed.2d 526, 94 S.Ct. 517 (1973), that a river rechannelization created an accretion rather than an avulsion. Insofar as it held the issue to be one of federal rather than state law, the *Bonelli* decision was overruled by *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 50 L.Ed.2d 550, 97 S.Ct. 582 (1977).

In the meanwhile, however, the Washington Court of Appeals for the Division which includes Pierce County had adopted the *Bonelli* decision. *Strom v. Sheldon*, 12 Wn. App. 66, 527 P.2d 1382 (Div. 2, 1974). In that case, citing the *Bonelli* decision as "a striking illustration of this analysis" (12 Wn. App. at 71, 527 P.2d at 1385), the Court held that where a navigable channel had been dredged and the original riparian boundary placed on dry land, the resulting exposed land would be deemed to have accreted to the adjoining uplands. Since under the *Corvallis* decision, *supra*, the question of accretion is one of State law, the Port as owner of the adjoining upland is owner of the exposed river bottom.

(B) If there were a doubt as to the applicability of *Strom v. Sheldon*, *supra*, the issue should have been certified to the Supreme Court of Washington. Although the Port moved, pursuant to R.C.W. Ch. 2.60 for a certification of the question of Washington law to the Supreme

Court of Washington, no ruling was made on the motion and it was impliedly denied by the Court's judgment. Certification of such questions will be directed where local law is uncertain and the issue novel. *Lehman Bros. v. Schein*, 416 U.S. 386, 40 L.Ed.2d 215, 94 S.Ct. 1741 (1974). Such certification "saves time, energy, and resources and helps build a cooperative judicial federalism", *Ibid.*, 416 U.S. at 391, 40 L.Ed.2d at 220, 94 S.Ct. at 1744. The procedure should have been followed here.

5. The State of Washington should have been named as an indispensable party.

Except as specifically conveyed by the Congress, the beds of navigable waters in the Oregon Territory, including those on the Puyallup Reservation, were reserved by the United States as trustee for the future states, which succeeded to such title on admission to the Union. *United States v. Ashton*, 170 Fed. 509, 512–513 (1909). The State of Washington owned the bed of the Puyallup River unless it was conveyed to the Tribe by the 1857 Executive Order, and still owns it if the 1948 channelization was not the equivalent of an accretion. The State and the Port dispute the Tribe's position on the first issue, and the State and the Tribe dispute the Port's position on the second.

The Tribe did not, despite F.R.C.P. 19 (c), join the State as a party. The Port raised the issue of such non-joinder in the pre-trial order, and the State filed an amicus brief asserting that it claims the property. Nevertheless the State was not joined and its claim remains unresolved.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX "A"

COPY OF THE TREATY OF DEC. 26, 1854, WITH THE NISQUALLY, PUYALLUP AND OTHER BANDS OF INDIANS.

FRANKLIN PIERCE, PRESIDENT OF THE UNITED STATES,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a Treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to-wit: Articles of agreement and convention made and concluded on the She-nah-ham, or Medicine Creek in the Territory of Washington, this twenty-sixth day of December in the year one thousand eight hundred and fifty-four by Isaac I. Stephens, Governor and Superintendent of Indian affairs of the said Territory, and the undersigned chiefs, head-men, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Steh-chas, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes, and bands of Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish and convey to the United States all their right, title and interest in and to the lands and country occupied by them, bounded and described as follows, to-wit:

Commencing at a point on the Eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a Southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White Rivers, to the summit of the Cascade Mountains; thence Southerly along the summit of said Range, or a point opposite the main source of the Skookum Chuck Creek; thence to and down said Creek, to the coal mine; thence Northwesterly to the summit of the Black Hills; thence Northerly, to the upper forks of the Satsop River; thence Northeasterly,

through the portage known as Wilke's Portage, to Point Southworth, on the Western side of Admiralty Inlet; thence around the foot of Vashon's Island, Easterly and Southeasterly, to the place of beginning.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small Island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's Inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres on Puget's Sound near the mouth of the She-nah-ham Creek, one mile West of the Meridian line of the United States Land Survey and a square tract containing two Sections, or twelve hundred and eighty acres, lying on the South side of Commencement Bay; which which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the Superintendant or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of the citizens of the United States and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves and on the other hand, the right, of a way with free access from the same to the nearest public highway is secured to them.

ARTICLE 3. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands; Provided, however, that they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses and shall keep up and confine the latter.

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred

dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year for the next three years, two thousand dollars each year; for the next four years, fifteen hundred dollars each year; for the next five years, twelve hundred dollars each year; for the next five years, one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time, to time, determine, at his discretion, upon what beneficial objects to expend the same. And the Superintendant of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians, in respect thereto.

ARTICLE 5. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assigns the same to such individuals or families, as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the Sixth Article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements here-to-fore made by any Indian, and which he shall be compelled to abandon in consequence of this Treaty, shall be valued, under the direction of the President, and payment be made accordingly therefor.

ARTICLE 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid tribes and bands acknowledge their dependence on the Government of the United States and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved, before the agent the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribes except in self defence, but will submit all matters of difference between them and other Indians to the Government of the United States, or its agents, for decision and abide thereby. And if any of the said Indians commit any other depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this Article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits and to prevent their people from drinking the same; and therefore it is provided, that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 10. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advise to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the Superintendant or agent.

ARTICLE 13. This Treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President, and Senate of the United States.

Proclaimed March 3, 1855.

APPENDIX "B"

Nisqually Reserve,

in Puyallup Agency: occupied by Muckleshoot, Nisqually, Puyallup, Skwawksnomish, Stailakoom, and five other tribes, treaty of December 26, 1854.

DEPARTMENT OF THE INTERIOR,

Office of Indian Affairs, January 19, 1857.

SIR: The treaty negotiated on the 29th of December 1854, with certain bands of Nisqually, Puyallup, and other Indians of Puget Sound, Washington Territory (article 2), provided for the establishment of reservations for the colonization of Indians, as follows: (1) the small island called Klah-chemin. (2) A square tract containing two sections near the mouth of the She-nah-nam Creek. (3) Two sections on the south side of Commencement Bay.

The sixth article of the treaty gives the President authority to move the Indians from those locations to other suitable places within Washington Territory, or to consolidate them with friendly bands.

So far as this office is advised a permanent settlement of the Indians has not yet been effected under the treaty. Governor Stevens has formed the opinion that the locations named in the first article of the treaty were not altogether suitable for the purpose of establishing Indian colonies. One objection was that they are not sufficiently extensive. He reported that 750 Indians had been collected from the various bands for settlement.

I have the honor now to submit for your consideration and action of the President, should you deem it necessary and proper, a report recently received from Governor Stevens, dated December 5, 1856, with the reports and maps therewith, and as therein stated, from which it will be observed that he has arranged a plan of colonization which involves the assignment of a much greater quantity of land to the Indians, under the sixth article of the treaty, than was named in the first article. He proposes the enlargement of the Puyallup Reserve at the south end of Commencement Bay to accommodate 500 Indians: the change in the location, and the enlargement of the Nisqually Reserve, and the establishment of a new location, Muckleshoot Prairie, where there is a military station that is about to be abandoned.

The quantity of land he proposes to assign is not, in my opinion, too great for the settlement of the number of Indians he reports for colonization: and as the governor recommends the approval of these locations and reports that the Indians assent thereto, I would respectfully suggest that they be approved by the President, my opinion being that, should it be found practicable hereafter to consolidate the bands for whom these reserves, the authority to effect such objects will still remain with the President under the sixth article of the treaty.

Within the Puyallup Reserve there have been private locations and the value of the claims and improvements has been appraised by a board appointed for that purpose at an aggregate of $4,917.

In the same connection I submit the governor's report of August , 1856 which he refers to, promising that the proceedings of his conference with the Indians therein mentioned were not received here with the report.

Very respectfully, your obedient servant,

GEO. W. MANYPENNY, *Commissioner.*

Hon. R. McCLELLAND,

Secretary of the Interior.

PART III. EXECUTIVE ORDERS RELATING TO RESERVES.

DEPARTMENT OF THE INTERIOR.

Washington, January 20, 1857.

SIR: I have the honor to transmit a communication of the 19th instant, from the Commissioner of Indian Affairs to this Department, indicating the reservations selected for the Nisqually, Puyallup, and other bands of Indians in Washington Territory, and to request your approval of the same.

With great respect, your obedient servant,

R. McCLELLAND, *Secretary.*

The PRESIDENT.

Approved.

FRANKLIN PIERCE.

JANUARY 20, 1857

NO. 83-958

IN THE SUPREME COURT

of the

UNITED STATES

October Term 1983

PORT OF TACOMA,
Petitioner,

vs.

PUYALLUP INDIAN TRIBE,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorney for Petitioner

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUYALLUP TRIBE OF INDIANS,
Plaintiff,

vs.

PORT OF TACOMA,
Defendant.

NO. C80-164T
MEMORANDUM OPINION
FINDINGS OF FACT
AND CONCLUSIONS OF LAW

STATEMENT OF THE CASE

This case came on regularly for trial before the above named court on May 4, 1981. Jurisdiction in this case is under 28 U.S.C. 1362. Venue is proper in this court in that the Puyallup river. which is at issue here. runs through the Western District of Washington and empties into Puget Sound at Tacoma, Pierce County, Washington.

The final Pretrial Order was filed on April 27, 1981. Counsel for both parties appeared, oral testimony of witnesses was taken, exhibits were filed, affidavits of other witnesses were filed for consideration by the court. Pretrial briefs, and final arguments were made by both parties. Both parties submitted post-trial briefs. Findings of Facts and Conclusions of Law, before trial and after trial, were submitted for the court's

consideration. The cases cited by both parties as possible authority for any of the issues involved herein were all read and considered by the court.

The court has heard, reviewed, weighed and evaluated all of the evidence in accordance with the applicable Federal Rules of Civil Procedure, Local Rules and the Rules of Evidence.

Although the court did not believe that the United States of the State of Washington were indispensable or necessary parties in this case, the court did invite both to file amicus curiae briefs. The United States did not respond, but the Attorney General of the State of Washington did file a brief. The court has considered that brief.

SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

The issues in this case, as the court understands them does not involve Indian treaty fishing rights as such. But, the history of the Puyallup Indians as to fishing on the Puyallup River is one of the basic issues before the court.

The parties are before the court seeking an order quieting title to two parcels of real property. The Puyallup Indian Tribe, the Plaintiff herein, and the Port of Tacoma, the Defendant herein, each claim ownership of the two parcels of real property located within the exterior boundaries of the Puyallup Indian Reservation.

The court has read the decisions in *Puyallup I*, 391 U.S. 392, 88 S.Ct. 1725, 20 L. Ed. 2d 689, and *Puyallup II*, 414 U.S. 544, 94 S. Ct. 330, 38 L. Ed. 2d 254, and *Puyallup III*, 433 U. S. 165, 97 S. Ct. 2616, 53 L. Ed. 667. The decisions in those cases are not dispositive of the issues here. Those cases involved state regulations in the interest of conservation as to Indian treaty fishing rights, net fishing for steelhead trout, by Indians, on the Puyallup Reservation, and the issue of whether or not the Puyallup Indians had exclusive rights under federal treaty to take steelhead passing through the Puyallup River within the confines of the Puyallup Reservation.

In *Puyallup III* the Supreme Court of the United States decided that the language used in the 1868 Treaty of Fort Laramie was virtually identical to the language used in Article II of the 1854 Treaty of Medicine Creek, see *Puyallup III* at 174.

The court is aware that there is no language in the Treaty of Medicine Creek of 1854 and 1855 or in the Executive Order of January 20,1857 that definitely declares or otherwise makes plain any intention to convey, nor are there any express conveyances that expressly conveyed or referred to the bed of the Puyallup River. The property involved in this lawsuit was not within the exterior boundaries of the 1280 acre Puyallup Reservation as it was established by the Medicine Creek Treaty. But, the property is within the exterior boundaries as established by the Executive Order of January 20, 1857.

It is with the foregoing in mind that the Court examines and decides the issues in this case.

The question is whether the United States conveyed beneficial ownership of the Puyallup riverbed, within the exterior boundaries of the Puyallup Reservation, to the Puyallup Indians by the Treaties of 1854-1855 and the Executive Order of January 20, 1857, and therefore continues to hold the land in trust for the use and benefit of the tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Washington upon its admission to the Union. *Montana v. U.S.*, 49 L. W 4296 and *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627-628.

As a general principle the federal government holds lands under navigable waters in trust for future states, to grant to such states when they enter the Union. There is a strong presumption against conveyance of such lands by the United States. *Montana v. U.S., supra, U.S. v. Oregon*, 295 U.S. at 14.

This court cannot infer such a conveyance "unless the intention was definitely declared or otherwise made plain." *U.S. v. Holt State Bank*, 270 U.S. 49, at 55, *Montana v. U.S., supra.*

It has been determined, however, that congress may sometimes convey lands below the high water mark of a navigable water. *Shively v. Bowlby*, 152 U.S. 1, *Montana v. U.S., supra.*

Whether a grant or reservation included the bed of a navigable river depends upon whether there was demonstrated an intention to do so. That intent is to be determined from the documents which created the reservation and from other available documents and surrounding circumstances which reflect the intention of the parties. *Montana v. U.S., supra; Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 87.

In order to find that a riverbed was included within a reservation there must have been a public exigency to justify a departure from the normal rule. The Supreme Court has defined "public exigency" to include three kinds of situations. They are as follows: (1) performance of international obligations; (2) improvement of commerce, or (3) "carrying out other public purposes appropriate to the objects for which the territory was held." *U.S. v. Holt State Bank, supra; Shively v. Bowlby, supra.*

The establishment of an Indian Tribe can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby,* justifying a congressional conveyance of a riverbed.

The Puyallup Tribe of Indians is duly recognized by the United States Secretary of Interior. The Tribe is located on the Puyallup Indian Reservation in the Western District of Washington. Members of the Tribe are descended from Puyallup Indians who were parties to the Treaty of Medicine Creek 1854-1855 and the Executive Order of January 20, 1857.

The importance of fishing to the diet and way of life of an Indian Tribe is among the circumstances which can demonstrate the required "public exigency" sufficient to support a finding that the bed of a river was included within an Indian reservation. *Montana v. U.S., supra; Alaska Pacific Fisheries v. U.S., supra.*

This court has reviewed, weighed and evaluated all of the evidence presented herein by both parties, and the court is persuaded by the most credible evidence that at the time of the Treaty of Medicine Creek, 1854-1855, and the Executive Order of January 20, 1857, the Puyallup Indians depended primarily upon fishing for their diet, and as a primary item of trade with other Indians as well as later with non-indians. The evidence also shows that the Puyallup Indians had occupied the area around the Puyallup River, Commencement Bay and the surrounding areas of southern Puget Sound since time immemorial.

The court is convinced by a preponderance of the evidence adduced herein, that the Puyallup Indians centered their lines in and around the

Puyallup River. Their primary diet, their spiritual, religious, political, and social life came from the river.

The court is also persuaded by a preponderance of the evidence that the establishment of the Puyallup Indian Tribe was an "appropriate public purpose" justifying a congressional conveyance of a riverbed.

The expansion of the Puyallup Reservation by the Executive Order of January 20, 1857 to include that area of the Puyallup River now at issue here was a "public exigency." The evidence is substantial, and actually uncontradicted by any credible evidence that there was an urgent and immediate need which the United States felt to meet the needs and desires of the Indians so as to end the war which was then taking place.

The land at issue here is not included within the 22 acres remaining on the reservation. The alienation of land by those certain members of the Puyallup Tribe did not transfer title to any part of the Puyallup River.

Grants of land adjacent to a navigable river generally, as a matter of law, do not include the bed of the river. *Montana v. U.S., supra.* That general rule, the intent of the parties described in the Findings of Fact, and the stipulation of Defendant's counsel on this issue, all demonstrate that the bed of the Puyallup River was not included in the assignment of parcels of land to those certain Puyallup Indians made under the allotment program in 1886.

Pursuant to two acts of congress, 27 Stat. 633, and c 181[illegible], 33 Stat. 566, certain members of the Puyallup Tribe alienated, in fee simple absolute, all but 22 acres of their 18,000 acre reservation. None of the 22 acres abuts on the Puyallup River. *Puyallup Tribe v. Dept of Game State of Washington*, 433 U.S. 165; 97 S. Ct. 2616.

Relying on *Mattz v. Arnett*, 412 U.S. 481, 93 S. Ct. 2245, 37 L. Ed. 92, the Court of Appeals, Ninth Circuit, held "that the Puyallup Indian Reservation continues to exist," *U.S. v. State of Washington*, 496 F.2d 620 (9th Cir. 1974).

The facts in this case show that by a preponderance of the evidence that the Puyallup River was at all times pertinent herein, and is still today a navigable river.

It is the opinion of this court that the preponderance of the evidence shows that the facts and circumstances herein are substantial and persua-

sive, that the United States intended, and did include, the underlying bed of the Puyallup River as part of the Puyallup Indian Reservation.

The effect of movement of a river channel on ownership of property in the vicinity of a river is to be determined by federal law. However, federal law will look to the law of the state in which the case arises for the legal standards.

Under Washington law, changes in river channels, as applied to this case, involve certain accretive changes and avulsive changes.

Under Washington law, when the bank of a navigable river forms the boundary between property owners, that boundary changes with accretive changes in the river channel. *Harper v. Holston*, 119 Wash. 436, 441, 205 Pac. 1062, 1064; *Smith Tug & Barge Co. v. Columbia Pacific Towing Corp.*, 78 Wn.2d 975, 482 P.2d 769, 771.

Any portion of the property which may have been outside of the river channel when part of the Puyallup Reservation was allotted in 1886 was added to the riverbed by a series of accretive changes between 1886 and the later 1940's and was, therefore, added to the Tribe's ownership of the bed. *Ghione v. Washington*, 26 Wn.2d 644, 175 P.2d 955, 962.

Movement of the Puyallup river by the Army Corps of Engineers, as described in the finding herein, constitutes an avulsive change under Washington law. *Harper v. Holston, supra; Ghione v. Washington, supra; Rose v. Rieding*, 13 Wn. App. 222, 534 P. 2d. 146; *Parker v. Farrell*, 74 Wn. 2d 553, 445 P. 2d 620.

When artificial relocation of a river channel leaves portions of the former channel abandoned as dry land, the owner of the river bed retains ownership of the abandoned channel under Washington law. The owner of the adjacent property to the abandoned channel does not receive title. *Hill v. Newell*, 86 Wn. 227, 149 P. 951; *Commercial Waterway District v. Washington*, 50 Wn. 2d 335, 311 P. 2d 680; *Ghione v. Washington, supra.*

The court now makes Findings of Facts and Conclusions of Law. They are based upon a preponderance of the evidence that the court has found most credible and all reasonable inferences drawn therefrom.

FINDINGS OF FACT

1. Jurisdiction in this case is under 28 U.S.C. 1362. Venue is proper in that the Puyallup River at issue here, runs through the Western District of Washington and empties into Puget Sound at Tacoma, Pierce County, Washington.

2. The Puyallup Tribe of Indians is an Indian Tribe with a governing body duly recognized by the United States Secretary of the Interior. The Tribe is located on the Puyallup Indian Reservation in the western part of Washington. Members of the Tribe are descended from Puyallup Indians who were parties to the Treaty of Medicine Creek (10 Stat. 1132, December 26, 1854). PTO ¶ 1; testimony of Dr. Barbara Lane.

3. The Port of Tacoma is a municipal corporation under the laws of Washington. It is neither an Indian Tribe nor an Indian person. PTO ¶ 2.

4. The Puyallup Tribe and the Port of Tacoma each claim ownership of certain real property designated parcels 133 and 134, more particularly described in Admitted Fact No. 3 in the Pretrial Order. The Port has no deed or other document reflecting ownership of the property and does not base its claim on any documentary chain of title. (The term "the property" shall be used in these findings of fact and conclusions of law to refer to the above real property.) PTO ¶'s 3, 45; Exh. 31, D-1.

5. Puyallup Indians have occupied the area around the Puyallup River, Commencement Bay, and surrounding areas of southern Puget Sound since time immemorial. Before and at treaty times, Puyallup Indians lived in a number of villages throughout the Puyallup watershed and in the surrounding area. Each village in the Puyallup River watershed was located on the banks of the Puyallup River, one of its tributaries, or on saltwater. The villages were permanent, year-round places of residence which were located as they were because of the importance of the Puyallup River and its tributaries to the Indians. Although each village was a separate unit, the villages were united by their identification with the Puyallup River watershed, as described below. Although some members would leave their village to hunt and fish for short periods, they then returned to their own villages. Each village obtained the major portion of its food and other necessities from its surrounding area within the Puyallup drainage system. The main Puyallup village was located in the vicinity of the property. PTO ¶ 6; Exhs. 24,30; testimony of Dr. Lane.

6. For Puyallup Indians. the fresh water courses of the area were the center of their world and their lives. Puyallup people identified themselves by the name of their village, which was in turn derived from the name of the water course on which the village was located. The Indians conceived of geographical boundaries not as a line around a certain area but as a waterway plus the land that surrounded it. Thus, Puyallup Indians conceived of their territory as the Puyallup River and the surrounding land. Their equivalent of political unity or allegiance was their sense of affinity with other villages and people in the Puyallup River drainage system. The Puyallups' spiritual, religious and social life centered around the river. Further the Indians identified directions by reference to the major water courses, using such terms as up-sound, down-sound, upstream, and down-stream. PTO ¶7; Exh.24; testimony of Dr. Lane.

7. Fishing for salmon and steelhead has always been central to the way of life of Puyallup Indians. Fish were the central item of their diet, primary item of trade with other Indians and later with non-Indians, and central to one of their most important religious ceremonies. Puyallup Indians have maintained that focus and dependence on fishing in accordance with their traditional ways and treaty-reserved rights. The Puyallup River has always been, and is today, the central and most important fishing area for the Tribe, and has been determined by the federal courts to be among the Tribe's usual and accustomed fishing grounds and stations as that term is used in Article 3 of the Treaty of Medicine Creek. Among the methods they used for harvesting fish in the river were weirs and traps, substantial structures which spanned the width of the river with a series of wooden tripods which were firmly implanted in the bed of the river. Although they were removed or washed out during high water, they were replace for each fishing season. PTO ¶'s 8, 9; Exhs. 3, 24, 30, 48, 49, 50; testimony of Dr. Lane.

8. Small boats have always used the lower portion of the Puyallup River including that portion of the river in the vicinity of the property. Puyallup Indians navigated the river with their fishing boats and canoes. The Indians designed canoes especially suited to traversing the perils of the river. The canoes would ofter be poled rather than paddled to traverse difficult stretches. The Puyallup River was, before channelization, and is today navigable in fact. PTO ¶43' testimony of Whitney M. Borland; testimony of Frank G. Wright.

9. The United States sought treaties with the Indians in the Pacific Northwest in order to clear title to the land to allow settlement by non-Indians. Puyallup Indians and the United States signed the Treaty of Medicine Creek on December 26, 1855; the Treaty was ratified by the United States Congress on March 3, 1855. Among other provisions, the Indians ceded a large area of land to the United States but retained a small reservation "for their exclusive use . . . " The reservation set aside by the Treaty was a rocky forested section on the south side of Commencement Bay. PTO ¶'s 4,5,16,17; Exhs. 1,2; testimony of Dr. Lane.

10. The United States representatives at the treaty council, including Territorial Governor Isaac Stevens, who was responsible for negotiating the treaties, were very familiar with the importance of fishing to the Indians. Stevens' subsequent report on the Treaty to the Commissioner of Indian Affairs demonstrates his emphasis on the need to allow the Indians to continue to fish and his intent to locate the reservations to meet the Indians' needs and desires. PTO ¶ 19; Exh. 2; testimony of Dr. Lane.

11. Soon after the Treaty was signed, fighting broke out between Indians and non-Indians in the area, resulting in the deaths of many non-Indian settlers. Among the causes of those hostilities was the inadequacy of the area set aside as the Puyallup Reservation. One of the shortcomings of the Reservation was that it did not include the Tribe's traditional fishing areas and villages along the Puyallup River. PTO ¶ 17; testimony of Dr. Lane.

12. The United States sought to end those hostilities and gain peace by convening the Fox Island Council. The United States representatives expressed their awareness that the cause of the hostilities was the inadequacy of the Puyallup Reservation. Governor Stevens reminded the Indians that he had promised to modify the treaty reservations if they were unsuitable. He asked the Indians to make known their needs and desires; he stressed that the reservation would be changed so as to conform to their wishes. PTO ¶'s 18, 20; Exh. 3; testimony of Dr. Lane.

13. Stevens recognized and emphasized the importance of the Puyallup River when he spoke of the location of the expanded reservation.

> You shall have a large Res. at Nisqually, one large Res. on the Puyaloop [sic] . . . Now my children do you want a Res. on the Nis-

> qually and one on the Puyaloop [sic]. I will send word to the Great Father if you want a Res. at those places.

The Indians at the Council also stressed the importance of the river. with such statement as:

> I know that my people all want to live on the Puyallup [Stanop-se, a Puyallup]

and

> I am glad my people are going to have a Res. on the Puyallup. That is my home. [Old Simon, a Puyallup]

PTO ¶ 20; Exh. 3, testimony of Dr. Lane.

14. The parties at the Fox Island Council thus agreed to expand the Puyallup Reservation to include the lower portion of the Puyallup River. The Commissioner of Indian Affairs and Secretary of the Interior recommended that the agreement be adopted. President Pierce approved those recommendations in an Executive Order of January 20, 1857. Those recommendations show that the reservation was expanded pursuant to Article 6 of the Treaty of Medicine Creek. The expanded reservation included the property involved in this case. PTO ¶'s 18, 21, 24; Exh. 3, 4; testimony of Dr. Lane.

15. Governor Stevens' report on the Treaty, the discussions at the Fox Island Council, the United States' officials' awareness of the importance of the river to the Indians for bed, and later confirmation by federal officials, all demonstrated the intention and understanding that the Puyallup River and its bed were included as part of the reservation, and the intention to secure to the Puyallup Indians ownership and control of the lands and waters within the exterior boundaries of the reservation. PTO ¶'s 18-24; Exhs. 1-4, 47; testimony of Dr. Lane.

16. The hostilities which resulted from the inadequacy of the treaty reservation and which killed a number of non-Indian settlers were viewed by the United States as a serious, emergency situation, which needed an immediate response and solution. Government officials demonstrated a desire to do whatever was necessary to satisfy the Indians so as to end the fighting. Exhs.3, 4; testimony of Dr. Lane.

17. The President of the United States assigned parcels of land within the reservation to individual Puyallup Indians in 1886. That was done

pursuant to Article 6 of the Treaty of Medicine Creek, which provided for the possibility of allotment so that the Indians "would locate on the [land] as a permanent home . . ." PTO ¶ 27; testimony of Dr. Lane. There is nothing to indicate that either the United States or the Tribe intended to include the bed in any allotments, and several factors indicating an intent to exclude it. There is nothing to indicate that the allotments changed the Tribe's traditional concept of considering the waterways and their beds as communal property. Members of the Tribe continued to use the river and its bed whether or not they had allotments bordering the river. PTO ¶'s 28, 29, 47; Exhs. 1, 5-11, 14, 19, 20, 43.

18. Prior to the Army Corps of Engineers channelization project in the late 1940's the lower portion of the Puyallup River flowed through marshy lowlands in a winding series of S curves. The river has always carried a large amount of silt, sand, gravel, logs, and other sediment and debris. The river in the past deposited that material further downstream on the bed and along its banks. PTO ¶'s 31,32' testimony of Whitney M. Borland; Exhs. 13, 21-23.

19. Changes which took place in the river channel in the vicinity of the property prior to channelization were typical of rivers with the characteristics of the Puyallup River. That portion of the river was subject to a continuous process of erosion and soil deposit. That process consisted of erosion of one bank of the river, typically on the outside of a bend in the river, caused by the current of the river and debris carried by the river. At the same time, and typically on the bank opposite the place where erosion was occurring, sediment being carried by the river was deposited, extending that bank into the previous channel. Although the volume of sediment deposited and the rate of erosion varied depending on river conditions, the process in the lower portion of the river was a very gradual one which changed the banks of the river channel gradually over a period of years. PTO ¶ 33; testimony of Whitney M. Borland; Exhs. 13, 21-23.

20. The channel of the Puyallup River in the vicinity of the property gradually but continuously modified its banks and shifted its course between 1874 and the late 1940's. That change was caused by the process described in Finding 19. The river never abandoned its channel, and the total distance which the channel in the vicinity of the property moved during that period of approximately 70 years was less that the width of the channel. There is no evidence of any sudden movement by the river or

abandonment of this channel in the vicinity of the property prior to the late 1940's. PTO ¶ 34; Exhs. 21-23, 36-42; testimony of Whitney M. Borland.

21. The Army Corps of Engineers channelization project in the late 1940's removed the river from its channel in the vicinity of the property and relocated it in the artificially constructed channel, leaving the property exposed as upland on the bank of the river. Property not involved in this case was taken from the Puyallup Tribe in the condemnation action which provided land for the rechannelization project. PTO ¶ 38; Exhs. 34, 35, 46; testimony of Whitney M. Borland.

22. The river channel, in the vicinity of the property, is today in the same location as it was immediately after the channelization project. The property is not riparian to the Puyallup River. PTO ¶ 38; Exhs. 34, 35; testimony of Whitney M. Borland; testimony of William F. Kittrell.

23. As part of the channelization project, the Corps of Engineers obtained permits from the Bureau of Indian Affairs to deposit dredge spoils on the property. The Bureau was considered the appropriate agency because the property was described as Puyallup Indian Land. PTO ¶ 39; Exhs. 26, 28.

24. The maps labeled Exhibits 34-42 accurately reflect, as well as can be determined, the channel of the Puyallup River in the vicinity of the property at the times indicated on the respective maps. There are other maps of the river available, but none shed any additional light on the position of the river in the vicinity of the property. PTO ¶ 40; Exhs. 34-42; testimony of Whitney M. Borland.

25. The State of Washington was admitted to the United States in 1889. PTO ¶ 44.

26. All uncontested facts contained in the Pretrial Order, but not specifically stated in these Findings are incorporated herein by reference.

FROM THE FOREGOING, THE COURT MAKES THE FOLLOWING

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this case under 28 U.S.C. 1362, in that this is an action brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, and presents a question arising under the treaties, Constitution, or laws of the United States. The Puyallup River at issue here, runs through the Western District of Washington.

2. The Puyallup Tribe and the Port of Tacoma each claim ownership of certain real property described as follows:

PARCEL 133

A parcel of land in Section 3, Township 20 North, Range 3 East, Willamette Meridian, Pierce County, Washington, being:

That part of the Puyallup River channel as it existed immediately prior to the channelizaton of that portion of the river by the United States Army Corps of Engineers, adjacent to government Lots 3, 4 and 9 in said Section 3, bounded on the northeast by the former right bank of said river at the former line of ordinary highwater, and on the southwest and southeast by the Puyallup River Flood Control Project boundary;

Particularly described as, commencing at the center of said Section 3:

S.89° 51'17" W., 750.93'

S. 42° 23'14" E., approximately 711.50 feet, to the former line of ordinary highwater of the Puyallup River the true point of beginning;

From the true point of beginning,

S. 42° 23'14" E., approximately 1945 feet to a point of curve to the left in a northerly direction from whence the axis bears N. 43° 47'11" W., 523.69 feet;

Along said curve approximately 360 feet to the former line of ordinary highwater.

Along the former line of ordinary highwater in a northwesterly direction to the true point of beginning

Containing 9.39 acres more or less.

and

PARCEL 134

A parcel of land in the former Puyallup River channel as it existed immediately prior to the channelization of that portion of the river by the United States Army Corps of Engineers, adjacent to Lot 10, Section 3, Township 20 North, Range 3 East, Willamette Meridian, Pierce County, Washington, lying between the former line of ordinary highwater on the former right bank of said river and the Puyallup River Flood Control boundary line described as:

Commencing at the southeast corner of said Section 3; thence N. 89° 42'32" W., 940.04 feet; thence N. 42° 23'14" W., 238.60 feet to the point of beginning: From the initial point, N. 42° 23'14" W., 618.53 feet on a curve to the left from a radius which bears N. 46° 10'03" W., 623.69 feet, to the former line of ordinary highwater of the former right bank of said river, Upstream along said former highwater line to the point of beginning. Containing 3.090 acres.

3. Indian Tribes have the right to file suit independently of the United States, where the United States holds the land in trust, and the Indian Tribe is the beneficial owner of the property. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365; *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465 (9th Cir.), *cert. denied.*

4. The Plaintiff Puyallup Tribe is the political successor in interest to the Puyallup Indians who signed the Treaty of Medicine Creek (10 Stat. 1132, December 26, 1854). *United States v. Washington*, 384 F. Supp. 312, 370 (W.D. Wash. 1974), *aff'd sub nom Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658 (1979).

5. As a general principle, the Federal Government holds lands under navigable waters in trust for future states, to grant to such states when they enter the Union, and there is a strong presumption against conveyance of such lands by the United States. *Montana v. U.S.* 67 L.Ed.2d at 502-505, *United States v. Oregon*, 295 U.S. at 14.

6. This court cannot infer such a conveyance "unless the intention was definitely declared or otherwise made plain." *United States v. Holt State Bank, 49, at 55. Montana v. U.S., supra.*

It is established, however, that congress may sometimes convey lands below the high water mark of a navigable water. *Shively v. Bowlby,* 152 U.S. 1, 48. *Montana v. U.S., supra.*

7. But, because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon, supra,* it will not be held that the United States has conveyed such land "except because of some special duty or exigency." *United States v. Holt,* 270 U. S. *supra.*

8. Whether a grant or reservation included the bed of a navigable river depends on whether there was demonstrated an intention to do so. That intent is to be determined from the documents which created the reservation and from other available documents and surrounding circumstances which reflect the intention of the parties. *Montana v. United States, supra; Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 87, (1918).

9. In order to find that a riverbed was included within a reservation, there must have been a public exigency to justify a departure from the normal rule. The Supreme Court has defined "public exigency" to include three kinds of situations: (1) performance of international obligations; (2) improvement of commerce; or (3) "carrying out other public purposes appropriate to the objects for which the territory was held . . . " *United States v. Holt State Bank, supra; Shively v. Bowlby, supra.*

10. The establishment of an Indian Tribe can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby, supra,* 152 U.S. at 48, justifying a congressional conveyance of a riverbed, se e.g., *Alaska Pacific Fisheries v. United States, supra; Montana v. U.S., supra.*

11. The importance of fishing to the diet or way of life of an Indian Tribe is among the circumstances which can demonstrate the required "public exigency" sufficient to support a finding that the bed of a river was included within an Indian Reservation. *Montana v. United States, supra, Alaska Pacific Fisheries v. United States, supra.* The vital importance of the Puyallup River to the Indians for fishing as well as a variety of other reasons, as described in Findings 4, 5, 6, 7, 9, 10, and 14, above, qualifies as a public exigency as defined by the Supreme Court.

12. Expansion of the Puyallup Reservation in 1857 to include the Puyallup River was a public exigency also because of the urgent and immediate need which the United States felt to meet the desires and needs of the Indians so as to end the war which was then taking place.

13. The bed of a navigable river will be deemed included in a grant or reservation only if the intention to do so was definitely declared or otherwise made plain or was rendered in clear and special words. *Montana v. United States, supra.*

14. The intention to include the Puyallup River as part of the reservation was definitely declared by Governor Stevens and by the Indians, as described in finding 10, 11, 12, 13, and 14, above.

15. Whether or not a body of water is navigable is to be determined by federal law. *Brewer-Elliot Oil & Gas Co. v. United States, 260,* U.S. 77,87. A river is navigable in law if navigable in fact. *The Daniel Bell,* 77 U.S. 557, 563. Since the Puyallup River was navigable in fact at the times germane to this case, as shown by the Findings of Fact and the agreement of the parties, it was navigable as a matter of law.

16. Grants of land adjacent to a navigable river generally, as a matter of law, do not include the bed of the river. *Montana v. United States, supra.* That general rule, the intent of the parties described in the findings of fact, and the stipulation of Defendant's counsel on this issue all demonstrate that the bed of the Puyallup River was not included in the assignment of parcels of land to the Puyallup Indians made under the allotment program in 1886.

17. Pursuant to two acts of congress, 27 Stat 633, and c. 1816, 33 Stat 565, the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000 acre reservation. None of the 22 acres abuts on the Puyallup River. *Puyallup Tribe v. Dept. of Game Sate of Washington,* 433 U.S. 165; 97 S Ct. 2616 (1977). The land at issue here is not included within the 22 acres remaining on the reservation. The alienation of land by the Puyallup Indians did not transfer title to any part of the Puyallup River.

18. Relying on *Mattz v. Arnett,* 412 U.S. 481, 93 S.Ct. 2245, 37 L.E.D. 92 (1973), the Court of Appeals for the Ninth Circuit held "that the Puyallup Indian Reservation continues to exist." *U.S. v. Washington,* 496 F.2d 620.

19. The effect of movement of a river channel on ownership of property in the vicinity of the river is to be determined by federal law. Federal law will look, however, to the law of the state in which the case arises for the substantial legal standards. *Wilson v. Omaha Indian Tribe*, 422 U.S. at 659-676.

20. The changes in the river channel, and the process by which those changes took place, described in Finding of Fact, 18, above, constitute accretive changes under Washington law. *Harper v. Holston*, 119 Wash. 436, 441; 205 P. 1062, 1064 (1922); *Smith Tug & Barge v. Columbia Pacific Towing Corp.*, 78 Wn. 2d 975. 977; 482 P. 2d 769, 771 (1971), *cert. denied*, 404 U.S. 829 (1971); *Heikkinen v. Hanson*, 57 Wn. 2d 840, 843; 360 P.2d 147 (1961).

21. Under Washington law, when the bank of navigable river forms the boundary between property owners, that boundary changes with accretive changes in the river channel. *Harper v. Holston, supra; Ghione v. Washington*, 26 Wn.2d 635,644; 175 P.2d 955, 962 (1946).

22. Any portion of the property which may have been outside of the river channel when part of the reservation was allotted in 1886 was added to the riverbed by a series of accretive changes between 1886 and the late 1940's and therefore was added to the Tribes's ownership of the bed. *Ghione v. Washington, supra.*

23. Movement of the river channel by the Army Corps of Engineers, described in finding 17 above, constitutes an avulsive change under Washington law. *Harper v. Holston, supra; Ghione v. Washington, supra; Rose v. Riedinger*, 13 Wn. App. 222; 534 P.2d 146 (Wn. Ct. App. 1975); *Parker v. Farrell*, 74 Wn 2d 553, 445 P.2d 620 (1968).

24. Under Washington law, when the bank of a river forms the boundary between two property owners, an avulsive change in the river channel does not affect the boundary. *Harper v. Holston, supra; Parker v. Farrell, supra.*

25. When artificial relocation of a river channel leaves portions of the former channel abandoned as dry land, the owner of the river bed retains ownership of the abandoned channel under Washington law. The owner of property adjacent to the abandoned channel does not receive title. *Hill v. Newell*, 86 Wash. 227; 149 P. 951 (1915); *Commercial Waterway District v. Washington*, 50 Wn. 2d 335; 311 P.2d 680 (1957); *Ghione v. Washington, supra.*

26. The United States did convey the beneficial ownership of the Puyallup riverbed, within the boundaries of the Puyallup Reservation, to the Puyallup Indians by the Treaties of 1854-1855 and the Executive Order of January 27, 1857.

27. The United States continues to hold the property at issue herein in trust for the use and benefit of the Puyallup Tribe.

28. Title to the bed of the Puyallup River, within the exterior boundaries of the Puyallup Reservation, did not pass to the State of Washington when it became a State of the Union in 1889.

29. Plaintiffs petition for Declaratory Judgment Quieting Title to the bed of the Puyallup River as to those parcels of real property herein described, is GRANTED.

DATED at Tacoma, Washington, this 24th day of July, 1981.

Jack E. Tanner

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

for the

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

JUDGMENT

CIVIL ACTION FILE NO. C80-164T

PUYALLUP INDIAN TRIBE

vs.

PORT OF TACOMA

This action came on for trial before the Court, Honorable JACK E. TANNER, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged Plaintiffs petition for Declaratory Judgment Quieting Title to the bed of the Puyallup River as to those parcels of real property herein described, is GRANTED.

Dated at Tacoma. Washington. this 24th day of July, 1981.

Bruce Rifkin
Clerk of Court

By Rosemary Freeny
Deputy in Charge,
Tacoma Office

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUYALLUP INDIAN TRIBE,
Plaintiff-Appellee,

v.

PORT OF TACOMA,
Defendant-Appellant.

No. 81-3480
D.C. No. CV 80-164-JET

OPINION

Appeal from the United States District Court
for the Western District of Washington
The Hon. Jack E. Tanner, District Judge, Presiding.

Argued and Submitted: January 4, 1983

BEFORE: BROWNING, Chief Judge, FLETCHER and PREGERSON, Circuit Judges.

FLETCHER, Circuit Judge:

This case involves a question of title to part of the former bed of the Puyallup River. The Port of Tacoma appeals from a ruling by the district court that the Tribe received title to the riverbed by treaty in 1857 and that a river rechannelization project in 1948-50 that exposed the former riverbed was an avulsive change of the river's course which left title to the bed in the Tribe as the pre-avulsion owner. *See Puyallup Tribe of Indians v. Port of Tacoma*, 525 F.Supp. 65 (W.D. Wash. 1981). The Port further challenges the court's ruling that the State of Washington and the United States need not be joined as necessary parties. We have jurisdiction under 28 U.S.C. § 1291 (1976) and affirm.

I

Prior to the arrival of white settlers in the mid-nineteenth century, the Puget Sound area and the rivers that drain into it, including the Puyallup, were inhabited by Indians known as Coast Salish. In 1854, representatives of various bands and groups of these Indians entered into the Treaty of Medicine Creek with the United States. In return for a number of reservations, a guarantee of continued fishing rights, and other promises, the Indians gave up their claim to their aboriginal homeland.

One of the Indian groups that signed the Treaty of Medicine Creek was known as the Puyallup Tribe. These Indians settled on a reservation on the south side of Commencement Bay near present-day Tacoma, Washington. This site did not include access to the Puyallup River and its fishery on which the Puyallup Tribe depended. The Tribe was very dissatisfied with its reservation and agitated vigorously (and sometimes violently) for an enlargement of the reservation to include a section of the river.

The Government recognized the importance of the fishery to the Tribe as well as the importance of pacifying the Tribe to protect white settlers in the area. In 1856, following a meeting between the Government and the Tribe at Fox Island, the Government recommended an expansion of the Puyallup Reservation to include a section of the Puyallup River. On January 20, 1857, by Executive Order, President Pierce set aside certain land that encompassed a section of the Puyallup River near its mouth as an enlargement of the Puyallup Indian Reservation. *See* A. Josephy, *Now That the Buffalo's Gone* 181-85 (1982).

Over the next 100 years, most of the reservation was allotted to individual Indians and passed into individual Indian and non-Indian ownership. Since the Puyallup River was navigable, the allotments along the river were bounded by the ordinary high water mark of the river. The Port of Tacoma eventually took title to certain of the allotments abutting the north bank of the river.

Between 1948 and 1950, the United States Army Corps of Engineers (Army Corps) "straightened" the Puyallup River, including the section of the river that passed through the reservation. As a result, a twelve-acre tract of the former riverbed was exposed. The Port of Tacoma was the owner of the uplands at the time of the rechannelization. It took posses-

sion of the newly exposed riverbed. Since 1950, the Port has had possession and exercised control over the twelve acres of exposed former riverbed and has leased it to industrial tenants.

In 1980, the Puyallup Tribe filed suit claiming beneficial title to the twelve acres of exposed former riverbed. *See* 28 U.S.C. § 1362 (1976). The Tribe based its claim on the 1857 Executive Order granting to it an enlarged reservation that encompassed part of the Puyallup River. Three days before trial, the Port filed a motion based on Federal Rule of Civil Procedure 19(a), requesting that the United States and the State of Washington be joined as necessary parties. The motion was denied.

Following a bench trial, the district court ruled that (1) the 1857 Executive Order granted to the Tribe title to that part of the Puyallup River bed within the exterior boundaries of the grant; (2) no subsequent transactions had divested the Tribe of this title; (3) the 1948-50 rechannelization of the Puyallup that exposed the former riverbed was an avulsive change of the river's course under Washington law; and (4) consequently, the Tribe's title to the former riverbed was superior to that asserted by the Port of Tacoma. The Port timely appealed from the district court's judgment quieting title in the Tribe and ejecting the Port.

II

The Port first challenges the district court's refusal to join both the United States and the State of Washington as necessary parties under Federal Rule of Civil Procedure 19(a). We are not persuaded that the district court erred.

The United States, as the trustee holding legal title to all real property owned by the Tribe, obviously has an interest in this litigation and it will not be bound by any decree ensuing from this litigation unless it is formally joined as a party. *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016, 1018 (9th Cir. 1973). Absent joinder of the United States, a judgment entered in this case in favor of the Port will not necessarily render complete relief to the Port or protect the Port from inconsistent judgments. *See* Fed. R. Civ. P. 19(a). Nonetheless, the rule is clear in this Circuit and elsewhere that, in a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it is *not* an indispensible party in whose absence litigation

cannot proceed under Rule 19(b). *Fort Mojave Tribe*, 478 F.2d at 1017-18; *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S 919 (1952); *see also Oneida Indian Nation of New York v. County of Oneida*, 434 F.Supp. 527, 544-45 (N.D.N.Y. 1977)(collection cases).[1]

We now turn to consider the Port's contention that the State of Washington is a necessary party to this proceeding. The Port asserts that the State has an interest in this litigation because, upon admission of Washington to statehood in 1889, it received title to all navigable streams within its boundaries then owned by the United States. *See United States v. Ashton*, 170 F. 509, 512-13 (C.C.W.D. Wash. 1909). Thus, if the Tribe had not been granted equitable title to the Puyallup River bed by treaty or by executive order and if the 1948-50 river rechannelization were avulsive, the State, and not the Port or the Tribe, would own the exposed riverbed.

Rule 19(a) requires a district court to join an absent party if any one of three specific conditions obtains: (A) in the absence of the party complete relief cannot be granted to those persons who are already parties, Fed. R. Civ. P. 19(a) (1); (B) the absent party claims an interest relating to the action and is so situated that disposition in his absence may "as a practical matter" impair the absent party's ability to protect that interest, *id.* at 19(a)(2)(i); or (C) the absent party claims an interest relating to the action and is so situated that disposition in his absence may subject a joined party to an inconsistent obligation, *id.* at 19(a)(2)(ii).[2] The "appropriate focus" in determining whether one or more of these conditions exist is on the "practical ramifications of joinder versus nonjoinder." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 & n.14a (9th Cir. 1983). The district court's Rule 19(a) decision will not be reversed absent a showing of abuse of discretion. *Id.* at 1043.

The Port does not specify the particular Rule 19(a) ground upon which it relies. We do not find the State a necessary party under any of the rule's criteria.

Rule 19(a)(1) would require joinder of the State if the court could not otherwise grant "complete relief" to those already parties. *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 662 F.2d 534, 537 (9th Cir. 1981). The essence of

an action in ejectment, which this case is, is to settle title between the adverse claimant and the party in possession. The district court can therefore provide complete relief to the parties to this action without joining other parties who might also claim an interest in the same land. Accordingly, Rule 19(a)(1) does not require joinder of the State in this ejectment action, even though the State might in the future challenge the title of the Tribe or the Port to the riverbed.

Rule 19(a)(2)(i) seeks to prevent the results of litigation before the court from impairing the legal interests of an absent party. Since the State can assert any interest it might have in another action, no legal interest it may have in the riverbed is impaired regardless of the outcome of this action.

Rule 19(a)(2)(ii) requires joinder to protect a party to the suit from inconsistent obligations by reason of a claimed interest of an absent party. Since the Tribe does not challenge the denial of the Rule 19(a) motion, we need reverse only if it is necessary to protect the Port's legal interests. We see no way in which the outcome of this ejectment action could possibly subject the Port to inconsistent obligations under two confliction judgments.

A judgment adverse to the Tribe, based on a conclusion that the Tribe never received title to the bed, would not be inconsistent with a subsequent declaration requiring the Port to remove itself in favor of the State. A determination in some later suit between the State and the Port that the State's title is superior to that of the Port, based perhaps on a conclusion that the 1948-1950 rechannelization of the Puyallup was avulsive and not accretive, would simply not be inconsistent with a determination here that the Port's title was superior to that of the tribe.

Nor would a conclusion in this case that the Tribe could not eject the Port from possession of the riverbed because the 1948-1950 rechannelization was accretive subject the Port to the possibility of inconsistent obligations. As a "practical" matter, the Port now has possession of the riverbed and will retain possession if it prevails in this litigation. Even if it is determined in a subsequent suit between the State and the Port that the Tribe did not receive title to the exposed riverbed, that the rechannelization was avulsive, and thus that the State has title to the bed, the Port will thereby incur no inconsistent obligations. That it must remove itself in

favor of the State is not an obligation inconsistent with a finding that it need not relinquish possession to the Tribe.

If the Tribe prevails, the Port may be ejected and may be contractually liable to its lessees for damages resulting from the ejectment. Such obligations would not be affected by a subsequent determination that the State has superior title to the Tribe. In any event, the Port would never again be entitled to possession[2].

For these reasons, we conclude that the district court did not abuse its discretion in refusing to join the State of Washington or the United States as a party to this action.

III

We now turn to the merits. The Port challenges, on two distinct grounds, the judgment of the district court ejecting the Port and quieting title to a portion of the former riverbed in the Tribe. First, it asserts that the United States did not convey title to the bed of the Puyallup River to the Puyallup Tribe either by treaty or by executive order. It contends that the Tribe lost whatever title it did have to the former bed when the river rechannelization project exposed the bed.

A

Appellant, citing *Montana v. United States*, 450 U.S. 544 (1981), argues that the district court erred as a matter of law in concluding that the United States conveyed title to the bed of the Puyallup River to the Puyallup Tribe. Appellee counters that the district court's conclusion on the issue of riverbed ownership is in accord with the Supreme Court's decision in *Montana v. United States* and that the district court's decision is supported by findings of fact which are not clearly erroneous. We agree with both parties to the extent that we find *Montana v. United States* controlling on the question of riverbed ownership. Accordingly, our analysis of the Tribe's claim of ownership of part of the former bed of the Puyallup River must begin with a close examination of the *Montana* decision.

In *Montana v. United States*, the Supreme Court considered a tribe's claim of title to the bed of a navigable river as it flowed through the tribe's reservation. 450 U.S. at 550-57. The Court's analysis of this issue starts from the premise that "[a] court deciding a question of title to the bed of a

navigable water must . . . begin with a strong presumption against conveyance by the United States, . . . and must not infer such a conveyance "unless the intention was definitely declared or otherwise made very plain." *Id.* at 552 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). At the same time, the court did not reject the analysis of *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), which the "Court did construe a reservation grant as including the bed of a navigable water." *See Montana*, 450 U.S. at 555-56 n.5. Nor did it gainsay the equally important proposition set forth in *Choctaw Nation* that "treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor." 397 U.S. at 631. Thus, when faced with a claim by an Indian tribe that it owns the bed of a navigable stream that flows through its reservation, we must accord appropriate weight to both the principle of construction favoring Indians and the presumption that the United States will not ordinarily convey title to the bed of a navigable river. *See Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 961-62 (9th Cir.), *cert. denied*, 103 S.Ct. 314 (1982).

The Supreme Court's opinion in *Montana* provides considerable guidance as to how a court can give proper effect to both the presumption against conveyance and the principle of construction favoring Indians. First, the Court recognized that "establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shively v. Bowlby*, 152 U.S. [1, 48 (1894)], justifying a congressional conveyance of a riverbed . . ." 450 U.S. at 556. However, the Court also cautioned that "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." *Id.* at 554. The Court cited two cases, apparently to illustrate proper resolutions in the face of the competing principles: *Alaska Pacific Fisheries v. United States* and *Skokomish Indian Tribe v. France*. *See id.* at 556.

In *Alaska Pacific Fisheries v. United States*, 348 U.S. 78 (1918), the Court was called on to decide whether a grant by Congress of "the body of lands known as Annette Islands" to the Metlakahtla Indians included the submerged lands surrounding and between the islands. The Court reviewed the history of the Annette Island Reservation and the Indian community and found:

> The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation.

Id. at 89. Accordingly, the Court concluded that not only was Congress aware of the Indians' reliance on the adjacent fishing grounds but also, in view of the importance of fishing to the Indians,

> Congress . . . did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands . . . embracing the intervening and surrounding waters as well as the upland . . .

Id.

In *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963), this court found that an Executive Order granting certain sections of land along the Hood Canal to the Skokomish Indians did not include a grant to the Tribe of tidelands below the ordinary high water mark. *Id.* at 210. The dispositive factor in construing the Executive Order to exclude a grant of the tidelands wa the fact that the Tribe did not rely on the particular tidelands included in the reservation as an important source of food.

> The use of the tidelands by the Indian tribe, as disclosed by the evidence, does not support appellant's contention that the tidelands were essential to the Indians' livelihood and that the Indians accordingly must have understood they were to have the tidelands.
>
> . . .
>
> It is true that shellfish and other forms of sea life were gathered by the Skokomish along the canal . . . "[T]he usual locations at which shellfish were procured were miles from the reservation and were reached by canoe travel on Hood Canal;" and . . . "the tidelands in issue, particularly in Section 26, are not and were not a source of native shellfish in usable quantities."

Id. at 210-11.

From the facts of *Skokomish Tribe* and *Alaska Pacific Fisheries*, we conclude that where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant

must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant. In such a situation, the Government's awareness of the importance of the water resource to the Tribe taken together with the principle of construction resolving ambiguities in transactions in favor of the Indians warrants the conclusion that the intention to convey title to the waters and lands under them to the Tribe is "otherwise made very plain" within the meaning of *Holt State Bank*, 270 U.S. at 55, *quoted in Montana*, 450 U.S. at 552.

This conclusion is confirmed by the penultimate paragraph of that section of the *Montana* decision dealing with the question of title to the Big Horn River bed:

> Moreover, even though the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby*, 152 U.S., at 48, justifying a congressional conveyance of a riverbed, see, *e.g.*, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 85, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. See *Shively v. Bowlby, supra*, at 48. *As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.* 1 App. 74. Cf., *Alaska Pacific Fisheries v. United States, supra*, at 88; *Skokomish Indian Tribe v. France*, 320 F.2d 205, 212 (CA9).

450 U.S. at 556 (emphasis added); *see also id.* at 570 (Blackmun, J., dissenting in part) (accepting majority's analysis, but concluding that there was a "public exigency" requiring Congress to convey bed of Big Horn River to tribe, since, *inter alia*, fishing was important to the Crow Tribe). Further, the recent Ninth Circuit decision in *Confederated Salish and Kootenai Tribes v. Namen* supports the conclusion that title to land submerged under navigable waters may pass to the tribe whose reservation encompasses the navigable water where that tribe is dependent on the water's resources for survival. 665 F.2d at 962 (the importance of fishing to the Kootenai Tribe cited as one of several factors distinguishing *Namen* from *Montana*).

In order to apply the teachings of *Montana* to the case before us, we review briefly those facts relevant to a determination of whether the United States made plain its intention to convey to the Puyallup Indians that portion of the Puyallup River bed that runs through their reservation. The Puyallup Tribe was one of the signatory tribes to the 1854 Treaty. Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, 1132; *see also* A. Josephy, *Now That the Buffalo's Gone* 181-82 (1982). The Puyallup Indians have occupied the area around the Puyallup River, Commencement Bay, and surrounding parts of Southern Puget Sound since time immemorial. At the time the Tribe entered into the 1854 Treaty, its members "were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers. Anadromous fish was the great staple of their diet and livelihood. They cured and dried large quantities for year-round use, both for themselves and for others through sale, trade, barter and employment." *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658,665 n.6 (1979)(quoting *United States v. Washington*, 384 F. Supp. 312, 406 (W.D. Wash. 1974)). Indeed, as the district court found, "[f]or Puyallup Indians, the fresh water courses of the area [from which they caught anadromous fish] were the center of their world and their lives . . . Puyallup Indians conceived of their territory as the Puyallup River and the surrounding land . . . The Puyallups' spiritual, religious and social life centered around the river." *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F.Supp. at 71. Governor Isaac Stevens, who was primarily responsible for negotiating the Treaty of Medicine Creek with the Indians on behalf of the United States, was aware of the importance of the fisheries to the Indians. *Fishing Vessel Association*, 443 U.S. at 666. Nonetheless, the original treaty of 1854 granted the Puyallups a reservation removed from their river without read access to their traditional fishing and village sites. In return for this unsuitable reservation, the Tribe relinquished its interest in its lands around Puget Sound so that the area could be opened for white settlement. *See generally* A. Josephy, *Now That the Buffalo's Gone* 181-85 (1982).

Needless to say, the Puyallups quickly recognized the inadequacy of their original reservation. As the district court found:

> Soon after the [1854] Treaty was signed, fighting broke out between Indians and non-Indians in the area, resulting in the deaths of many

> non-Indian settlers. Among the causes of those hostilities was the inadequacy of the area set aside as the Puyallup Reservation. One of the shortcomings of the Reservation was that it did not include the Tribe's traditional fishing areas and villages along the Puyallup River.

Puyallup Tribe of Indians v. Port of Tacoma, 525 F.Supp. at 72. The district court went on to find, based on expert testimony and documentary evidence, the following facts of particular importance to the question of riverbed ownership raised in the instant case:

> The United States sought to end . . . hostilities and gain peace [with the Puyallup and other Indians] by convening the Fox Island Council. The United States representatives expressed their awareness that the cause of the hostilities was the inadequacy of the Puyallup Reservation. Governor Stevens reminded the Indians that he had promised to modify the treaty reservations if they were unsuitable
>
> . . .
>
> Stevens recognized and emphasized the importance of the Puyallup River when he spoke of the location the expanded reservation.
>
> > You shall have a large Res. at Nisqually, one large Res. on the Puyaloop [sic] . . . Now my children do you want a Res. on the Nisqually and one on the Puyaloop [sic], I will sent word to the Great Father if you want Res. at those places.
>
> The Indians at the [Fox Island] Council also stressed the importance of the river with such statements as:
>
> > I know that my people all want to live on the Puyallup [Stanopse, a Puyallup].
>
> and
>
> > I am glad my people are going to have a Res. on the Puyallup. That is my home. [Old Simon, a Puyallup].
>
> . . .
>
> The parties at the Fox Island Council thus agreed to expand the Puyallup Reservation to include the lower portion of the Puyallup River. The Commissioner of Indian Affairs and Secretary of Interior recommended that the agreement be adopted. President Pierce approved those recommendations in an Executive Order of January

> 20, 1857. Those recommendations show that the reservation was expanded pursuant to Article 1 of the Treaty of Medicine Creek. The expanded reservation included the property involved in this case.

Id. It is in light of these pertinent facts that we must apply *Montana v. United States*.[8]

The findings of the district court support the conclusion that the 1857 Executive Order was a response to a public exigency—avoiding hostilities between the Indians and settlers so that the Puget Sound area could be opened safely for settlement. *See United States v. Montana*, 450 U.S. at 556 (citing *Shively v. Bowlby*, 152 U.S. at 48).[9] The intention to convey title to the riverbed to the Puyallup Tribe was made very plain by the negotiations between Governor Stevens and the Tribe at Fox Island. First, as in *Alaska Pacific Fisheries*, it was important to the Indians who met at Fox Island to have dominion not only over the water buy also over the land submerged beneath the water. *Compare Alaska Pacific Fisheries*, 248 U.S. at 87-90 (Indians sought to control non-Indian fish-trap built on submerged lands near the shore of the Annette Islands) with *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F.Supp. 65, 71 (W.D. Wash. 1981)(Puyallup harvested fish with wiers and traps, "substantial structures which spanned the width of the river [and] were firmly implanted in the bed of the river"). Second, and more important, unlike the situation in *Montana*, where the Crow Reservation was designed without special regard to the fact that it included a section of the Big Horn River, the Puyallup Reservation, at the insistence of the Indians, was enlarged specifically to include a segment of the Puyallup River.

The appellant does not seriously argue that the Puyallups would have understood the 1857 grant of land in any way other than as a conveyance to them of a section of the Puyallup River. Accordingly, we hold that there is sufficient evidence in this case of an intent to convey lands beneath navigable waters to the Tribe to support its claim of beneficial ownership of the former Puyallup River bed. *See United States v. Aranson*, 696 F.2d 654, 664-66 (9th Cir. 1983). The district court's decision on this point is therefore affirmed.[10]

B

The Port further contends that, even if the 1857 Executive Order granted title to the riverbed to the Tribe, the rechannelization of the riverbed in 1948-50 shifted title to the bed to the Port, the owner of the uplands adjoining the pre-channelization riverbed. By contrast, the Tribe argues that the district court properly concluded that the change in the location of the river resulting for the rechannelization by the Army Corps was "avulsive" under Washington property law and thereby left title to the riverbed in the Tribe, the party who owned the property immediately prior to the rechannelization. We conclude that the Tribe has the better position.[1]

The Puyallup River was navigable at the time allotments to the predecessors in title to the Port were made. Since grants of property bounded by a navigable river are deemed to be bounded by the ordinary high water mark of that river, *see Montana Power Co. v. Rochester*, 127 F.2d 189, 192 (9th Cir. 1942), the district court correctly ruled that the allotments of land adjoining the river made by the United States, on behalf of the Tribe, to the predecessors in title of the Port were bounded by the ordinary high water mark of the Puyallup River. *See* 525 F.Supp. at 76. Thus, after the allotments were made, the Tribe continued to have title to the riverbed of the Puyallup River within the reservation bounded on each side by the ordinary high water marks of the river.

For this reason, the common boundary of the properties to which the Port and the Tribe had title in 1948 was defined by the ordinary high water mark of the Puyallup River.[2] Consequently, we must consider whether the movement of the Puyallup River in 1948-1950 was an "avulsive" or an "accretive" change under Washington law. If the rechannelization were avulsive, title to the bed is in the Tribe. If accretive, the title to at least some, if not all, of the riverbed now lies in the Port as upland owner on one side of the bed, and the Tribe would have no basis for ejecting the Port.[3]

Several Washington cases make clear that whether a change in a physical aspect of a river is avulsive under Washington law depends on the *suddenness* and the *size* of the change. Where the change is both sudden and significant, the change is avulsive and the real estate boundaries dependent on the physical aspect of the water course are deemed fixed from that point onward as they were in fact immediately before the avulsive change took place.

In *Ghione v. State*, 26 Wash. 2d 635, 650, 175 P.2d 955, 962 (1946, for example, the Washington Supreme Court held that where a navigable riverbed had shifted by a "slow and continuous process," the boundary between the upland owner and the riverbed owner, defined as the ordinary high water mark of the river in the original grant, shifted along with the actual ordinary high water mark of the river. *See id.* (citing cases). Similarly, in *Harper v. Holston*, 119 Wash. 436, 443, 205 P.1062, 1064 (1922), the court held that where the actual meander line of a non-navigable stream had not moved by any "sudden or violent changes," the boundary of a tract described as the meander line of the stream was in accordance with the actual meander line.

By contrast, in *Parker v. Farrell*, 74 Wash.2d 553, 555-56, 445 P.2d 620, 622-23 (1968), the court held that where a "log jam" caused a river to "suddenly change [] its flow" and to move 500 feet to the south, the boundary of a tract defined as the thread of the river remained at the location where the thread of the river had been immediately before the change. Likewise, in *Ghione*, the court held that where a riverbed dried up as the result of a project of a commercial waterway district, the change was avulsive and left ownership of the former riverbed, now dry, in the party who had owned the riverbed when submerged. 26 Wash.2d at 651, 659-60, 175 P.2d at 962, 965.

The district court did not specifically find that the change in the configuration of the Puyallup during the rechannelization project in 1948-50 was sudden and significant. Rather, the court simply determined that the Army Corps had in fact "removed the river from its channel ... and relocated it in the artificially constructed channel, leaving the property exposed as upland on the bank of the river." 525 F.Supp. at 73-74. Nevertheless, the record nowhere indicates, nor does the Port argue, that the movement of the river southward by at least half its width in a period of less than two years was not in fact sudden and significant as opposed to gradual and imperceptible. Under the principles set forth by the Washington Supreme Court, the change in the banks of the river resulting from the Army Corps project falls squarely within the category of avulsive changes. Consequently, we conclude that the district court correctly ruled that the Tribe holds title to the Puyallup riverbed as it existed immediately before the 1948-50 change.

The Port argues strenuously that, even if the 1948-50 change should ordinarily be treated as avulsive, *Strom v. Sheldon*, 12 Wash. App. 66,

527 P.2d 1382 (1974), requires a finding that the riverbed accreted to the property of the Port, the pre-change upland owner. this contention is meritless.

In *Strom*, one of two landowners whose properties were bounded by the "thread" of a stream dredged the stream, moving the stream onto his property, and thereby left the former thread of the stream on dry land. *Id.* at 1383. As a result, the lot line of the non-dredging neighbor would have terminated far short of the river if the avulsive change rule were applied. *Id.* While assuming that the change in the river flow was in fact avulsive, the *Strom* court invoked a theory of "equitable treatment" first described by the Washington Supreme Court in an earlier case involving lakeshore navigation rights and refused to hold that the boundary line between the two property owners remained at the thread of the river immediately before the assumedly avulsive dredging. *Id.* at 1384-86. Emphasizing that it was the "defendants' predecessor himself who caused the shift in the corse" of the river and that to apply the avulsive rule would deprive the plaintiffs of a "valuable riparian interest," *id.* at 1386, the court ruled that the boundary line shifted along with the actual meander line of the stream, despite the avulsive change.

We do not read the decision of the Washington court of appeals in *Strom* to effect a radical abandonment of the well-settled principles governing real estate boundaries defined by physical aspects of watercourses in favor of a system of ad hoc determinations based on "equitable treatment" of the parties for all cases in which the allegedly avulsive change was the product of human as opposed to natural activity. To do so would be to ignore the decision of the Washington Supreme Court in *Ghione v. State*, where the court held that a change in the configuration of a river resulting from a commercial waterway project was avulsive. *See* 26 Wash.2d 635, 655, 659-60, 175 P.2d 955,962,965 (1946).

Rather, we construe *Strom* to carve out a limited exception where (1) one of the two conflicting landowners has in fact caused the river change which would otherwise be characterized as avulsive *and* (2) the other landowner would be deprived of river access by such a characterization. This is the more natural reading of the court's repeated emphasis in *Strom* of the fact that it was the acts of the defendants' own predecessor that caused the allegedly avulsive change. Since the Tribe was not responsible for the rechannelization, the special principle of "equitable treatment"

espoused in *Strom* is inapplicable. The ordinary avulsive change rule fully applies.[4]

IV

For the reasons set forth above, we affirm the district court's ruling that the State of Washington and the United States need not be joined. We further affirm its well-considered determination that the Executive Order of 1857 granted title to the riverbed to the Tribe and that the rechannelization resulted in an avulsive change in the Puyallup River, fixing the boundaries of the riverbed property owned by the Tribe by the location of the ordinary high water marks of the river immediately before the relocation of the river.

AFFIRMED.

FOOTNOTES

[1] *Minnesota v. United States*, 305 U.S. 382, 386-88 (1939), and *Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337,1339 (9th Cir. 1975), do not hold otherwise. In both *Minnesota* and *Tulalip Tribes*, the litigation was instituted by non-Indians for the purpose of effecting the alienation of tribal or restricted lands, not by individual Indians or a tribe seeking to protect Indian land from alienation. *See Oneida Nation*, 434 F.Supp. at 545 (distinguishing cases). Whether the Tribe is the plaintiff or the defendant in any given suit would not seem particularly relevant in a joinder decision under Rule 19(b), according to the factors set forth in the rule. We do not question, however, the distinction established in our circuit by the *Fort Mojave* and *Tulalip Tribes* cases for determining indispensability under Rule 19(b).

[4] Rule 19(a) provides in pertinent part: *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substan-

tial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that be be made a party.

[3]The State could suffer immediate practical impairment of its interest if, for instance, it were the Port's lessor but was not itself in possession of the riverbed. *See Washington v. United States*, 87 F.2d 421, 428-31 (9th Cir. 1936). Here, however, where neither the State itself nor any lessee of the State is asserted to be in possession of the riverbed, no practical impairment of the State's interests can result from an adjudication of who, between the Tribe and the Port, shall have possession of the riverbed.

[4]*McShan v. Sherrill*, 283 F.2d 462, 463-64 (9th Cir. 1960), in which we held that landowners asserting a claim to property that was the subject of part of a quiet title action were parties who should have been joined, does not require a contrary conclusion. First, in *McShan*, record title to the land at issue was in the absentees. Hence, *any* adjudication in their absence would "place [] a cloud upon the title of the absent landowner." 283 F.2d at 463. By contrast, in the ejectment action before us, a determination of the right to possession between the Port and the Tribe will not, in any practical sense, place any cloud on any title the State might have, since in any event record title to the property is not in the State. More significantly, while the *McShan* absentee had paid "all taxes" on the property, presumably on the assumption that they in fact owned the property, there is no indication here that the State has incurred any economic detriment in reliance on any purported right of ownership of the riverbed. For this reason as well, we conclude that the possible practical effects of this litigation on the State's interests are of an entirely different order from that of those requiring joinder in *McShan*.

[5]If the Port were to attempt to eject the State after the latter had ejected the Tribe, asserting that the rechannelization was accretive, the Port would meet a collateral estoppel defense based on the necessary finding here that the rechannelization was avulsive.

[6]This principle of treaty construction applies with equal force to statutes passed for the benefit of Indians, *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918), and to executive orders, *Moore v. United States*, 157 F.2d 760, 762 (9th Cir. 1946); *see Skokomish Indian Tribe v.*

France, 320 F.2d 205, 207-08 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964).

[7]We do not mean to suggest that this is the only circumstance in which the United States may be found to have granted the bed of a navigable water to an Indian tribe, but it is certainly one of the clearest. *See Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, 961-62 (9th Cir.), *cert. denied*, 103 S.Ct. 314 (1982).

[8]The district court's findings of fact, quoted above are not clearly erroneous. For the most part, the district court relied on the expert testimony of Dr. Barbara Lane as the basis for its findings with respect to the historical facts surrounding the Treaty of Medicine Creek, the Fox Island Council, the United States' interest in those proceedings, and the way of life and understanding that the Puyallup Tribe brought to the negotiations with the United States. Dr. Lane's expertise in this area was recognized in *United States v. Washington*, 384 F.Supp. 312, 350 (W.D. Wash. 1974), and the Port has offered no reason to doubt the reliability of her testimony.

[9]The Tribe does not contend that the 1854 Treaty of Medicine Creek conveyed title to the bed of the Puyallup River to it. Rather, it relies on the 1857 Executive Order, which expanded the reservation under the terms of the Treaty, as the conveying agreement.

[10]The Port's further arguments against the conclusion that the Tribe received title to the bed of the Puyallup River in 1857 are meritless. The appellee, Puyallup Tribe, is the successor to the tribe that received title to the river in 1857. *See Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165, 169 n.7 (1977)(*Puyallup III*); F. Cohen, *Handbook of Federal Indian Law* 6 (1982 ed.). An Executive Order may convey title to land to an Indian tribe as effectively an any other conveyance from the United States. *See* F. Cohen, *supra*, at 472, 493-97 (Generally, property rights in executive order reservations are similar to those in reservations created pursuant to treaty or statute . . . ").

Finally, the Port of Tacoma asserts that footnote 12 in *Puyallup III* bars the conclusion that the Tribe holds title to any part of the former Puyallup River bed. But as the Supreme Court acknowledged in that footnote, a claim of riverbed ownership was not even raised in *Puyallup III* and hence could not have been decided by the Court.

[11]Under *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671 & n.8, 676 (1979); the question of ownership of land that is allegedly part of an Indian reservation and has allegedly never been conveyed away by the United States or by the Tribe is an issue of federal law to be settled by reference to local law. *See United States v. Aranson*, 696 F.2d 654, 658 (9th Cir. 1983). Hence, Washington property law rules are incorporated into federal law to determine whether the Tribe now has title to the riverbed.

[12]The Port does not challenge the district court's conclusion that all changes in the configuration of the Puyallup River from the date allotments were first made in 1886 up to the date of rechannelization were accretive changes under Washington law. *See* 525 F.Supp. at 76-77. The common boundary of the riverbed and the allotted property therefore changed over the years between 1886 and 1948 to conform to the actual ordinary high water mark of the river. Thus, in 1948, immediately prior to the rechannelization, the Tribe had title to the riverbed of the Puyallup, bounded by the ordinary high water marks of the river as they then lay. *See Ghione v. Washington*, 26 Wash. 2d 635, 650, 175 P.2d 955, 962 (1946)(where bank of river forms boundary of two estates, the boundary changes with accretive changes in river bank).

[13]The accretion/avulsion principle of Washington real property law is an interpretive rule used in construing the terms of a grant describing the boundaries of real estate in words relating to a physical aspect of a river, *e.g.*, a river's "ordinary high water mark," or its "thread." The rule is based largely on the implied if not actual concerns of the owners of real estate.

The Washington Supreme Court has summarized the principle as follows:

> When the course of the stream changes, the boundary line may or may not shift with the stream. If the change is slow and imperceptible so that it may be classified as accretion or reliction, the boundary line shifts. If, however, the change of the stream is avulsive, the original boundary line remains.

Parker v. Farrell, 74 Wash.2d 553, 554-55, 445 P.2d 620, 622 (1968)(footnote omitted).

[14]The Port also contends that the district court abused its discretion in not certifying to the Washington Supreme Court the question of whether the change caused by the rechannelization of the Puyallup River was avulsive or accretive. *See Lehman Brothers v. Schein*, 416. U.S. 386, 390-91 (1974). This contention is meritless. Whatever further clarity certification would have provided, since the Washington law is rather well-defined, the trial judge's refusal to certify was not an abuse of discretion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUYALLUP INDIAN TRIBE,
Plaintiff-Appellee,

v.

PORT OF TACOMA,
Defendant-Appellant.

No. 81-3480

D.C. No. CV 80-164-JET

ORDER

BEFORE: BROWNING, Chief Judge, and FLETCHER and PREGERSON, Circuit Judges.

The petition for rehearing of the Port of Tacoma is hereby denied. The panel declines to consider the suggestion for rehearing en banc. 9th Cir. R. 12.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUYALLUP INDIAN TRIBE,
Plaintiff-Appellee,

vs.

PORT OF TACOMA,
Defendant-Appellant.

No. 81-3480
DC CV 80-164 JET

APPEAL from the United States District Court for the WESTERN District of WASHINGTON (Tacoma)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the WESTERN District of WASHINGTON (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 15, 1983.

NO. 83-958

In The
Supreme Court of the United States
October Term, 1983

PORT OF TACOMA,
Petitioner,

vs.

PUYALLUP INDIAN TRIBE,
Respondent.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE PUYALLUP INDIAN TRIBE IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district and circuit courts correctly determine from the evidence presented that the United States and the Puyallup Indians intended to include the Puyallup River and its bed as part of the Puyallup Indian Reservation?

2. Did the Puyallup Tribe retain its title to riverbed land which was exposed by an artificial river channelization project?

PARTIES

The Puyallup Indian Tribe and the Port of Tacoma are the only parties to this case.

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OPINIONS BELOW

The district court's opinion, findings of fact, and conclusions of law are reported at 525 F.Supp. 65 (W.D. Wash. 1981). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 717 F.2d 1251 (1983).

STATEMENT OF THE CASE

The Puyallup Indian Tribe and the Port of Tacoma here dispute title to 12½ acres of undeveloped land on the Puyallup Indian Reservation. The parcel was part of the bed of the Puyallup River immediately prior to a United States Army Corps of Engineers channelization project. Relocation of the river left the parcel as dry land outside the river channel.

The district court considered the stipulations made by the parties, examined more than 50 exhibits, considered the testimony of the expert witnesses, then made detailed findings of fact. 525 F.Supp. 65, 70-74. Applying the legal standards established by this Court in *Montana v. United States,* 450 U.S. 544 (1981), the district court[1] ruled that (1) both the United States and the Puyallup Indians intended to include the Puyallup River and its bed as part of the Reservation when it was enlarged by Executive Order and (2) under Washington law the channelization project did not disturb the Tribe's title to the former riverbed land. On the Port's appeal, the Ninth Circuit thoroughly reviewed the facts and legal standards and affirmed the district court's "well-considered determination" of both issues. 717 F.2d at 1264.

1. The Evidence Concerning Reservation Of The Riverbed

Petitioner's Statement of the Case ignores most of the evidence presented at trial, and the findings of fact based on that evidence, which addressed the key issue in the case: the intent of the United States and the Indians to include the bed of the Puyallup River as part of the

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[1] Which had jurisdiction under 28 U.S.C. 1362.

Puyallup Reservation when the Reservation was expanded in 1857. The evidence and findings show that the Puyallup River was at treaty times, as it is now, the center of the lives of the Puyallup Indians. Salmon, steelhead, and shellfish formed the bulk of the Puyallups' diet. The Indians also traded fresh and dried fish with settlers in the area and in distant regions. Fish and fishing activities were at the heart of their spiritual beliefs and social customs. (525 F.Supp. at 71, Findings 5-7). See also *Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664-666 (1979).

Puyallup Indians not only fished from the banks of the river and from boats, they also harvested fish from traps and weirs which entailed use of the riverbed itself. These substantial structures consisted of a series of wooden tripods lashed together which were firmly planted in the bed of the river. They spanned the river from bank to bank in a variety of locations. (Finding 7.)

The river and its bed were important to the Indians for other reasons as well. Villages were located for the most part on the rivers and their tributaries. The Indians took their personal names and the names for their villages from the river and tributaries on which they lived. Their concepts of territory, boundaries, and political unity were based on the rivers. Thus, Puyallup Indians conceived of their territory as the Puyallup River and the land for a certain distance on either side of it. Religious practices involved the river and its bed. (Findings 5 and 6.)

When Territorial Governor Isaac Stevens and other federal representatives negotiated the Treaty of Medicine Creek in 1854 (10 Stat. 1132; Pet. App. A-1 through A-5),

they knew that fishing was the most important part of the Indians' lives and the Puyallup River the center of the Puyallups' territory. When the boundaries of the Reservation were later marked out in an area that removed the Puyallup Indians from the Puyallup River, the Indians felt betrayed and went to war to protest. A number of settlers and Indians were killed. (525 F.Supp. at 72; Findings 9-11.)

Governor Stevens therefore met with the Indians at Fox Island in 1856 to correct the wrongs and make peace. The minutes of the Fox Island Council, an exhibit before the district court, show that the parties discussed modification of the Puyallup Reservation in detail. Both sides focused their attention on the importance of the Puyallup River to the Indians. Stevens, for example, said that he wanted to end the hostilities, to avoid future hostilities, and, after explicitly referring to the river, that "the Great Father" would modify the Reservation so as to satisfy the Indians. The Indians who spoke emphasized the importance of the river. Ultimately, Stevens recommended moving and enlarging the Puyallup Reservation so as to include the mouth and lower portion of the Puyallup River to satisfy the Indians. Department of the Interior officials recommended that the President adopt the agreement reached at Fox Island based on Governor Stevens' recommendations and the "Indians' assent." (Pet. App. A-7.) The President adopted that recommendation by Executive Order of January 20, 1857, I Kappler 920 (Pet. A-8), expanding the Reservation pursuant to Article 6 of the Treaty so as to include the body of land through which flowed the lower portion of the Puyallup River including the property involved in this case. In short, the expanded Reservation was located explicitly because of the presence

of the Puyallup River. (525 F.Supp. at 72-73, Findings 12-16.)

One of the Tribe's expert witnesses, anthropologist Dr. Barbara Lane, discussed the importance of the river to the Indians, the uses they made of the river and its bed, and the negotiations leading to the expansion of the Reservation.[2] Dr. Lane testified that in her opinion it was the intent of both the federal representatives and the Indians to include the river and its bed as part of the Reservation. She based that conclusion on the explicit discussion of the river at the Fox Island Council, the importance of the river to the Indians, the federal representatives' awareness of that importance, their selection of the reservation based on the location of the river, the correspondence from Department of the Interior officials, and corroboration found in later correspondence among federal officials and others. (Finding 15.)

The Port of Tacoma offered no documents or testimony whatsoever to dispute the Tribe's evidence concerning the history of the Puyallup Indians, the uses and importance of the river, or the intent of the parties. 717 F. 2d at 1260, n. 8.

2. The Change In The River's Course

The Puyallup River in its natural state meandered through the Puyallup River Valley, constantly changing its course by gradual erosion of the river banks. In the

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[2] Dr. Lane is one of the foremost authorities on Indians in the Pacific Northwest. The district judge in the leading fishing rights case in the Northwest noted her expertise, *United States v. Washington*, 384 F.Supp. 312, 350 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), *later substantially aff'd sub nom Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1977), and the Ninth Circuit here agreed. 717 F.2d at 1260, n. 8.

late 1940's the United States Army Corps of Engineers relocated the lower portion of the river in a relatively straight artificial channel. The property disputed in this case was a portion of the riverbed immediately before that channelization project but became dry land outside the channel as a result of the project. In the condemnation action which the United States had instituted to obtain land for the channelization project, it was recognized that former riverbed land was owned by the United States in trust for the Puyallup Indian Tribe. The Port of Tacoma nevertheless claimed title to the newly exposed land based on its status as record owner of the land adjacent to this property. The only use which the Port has made of the land, however, has been occasional leases of the property to third parties for storage of wood chips, firewood, and the like. (525 F.Supp. at 73-74, Findings 4, 18-23; Pet. 3).

REASONS FOR DENYING THE WRIT

The decision below correctly applies the rules reiterated by this Court in *Montana v. United States*, 450 U.S. 544 (1981), for determining ownership of land underlying navigable waters on Indian reservations. The judgment of the court of appeals does not conflict with any decision of this Court, of another court of appeals, or of a state court of last resort. Although similar cases may arise on some other reservations, the legal principles which the courts apply are not in dispute.[3] This Court indicated in *Montana*

[3] Although the Puyallup Tribe disagrees with some of those principles, it did not raise those disputes here, showing instead that it is entitled to the property even under the *Montana* standards.

(450 U.S. at 556) and petitioner concedes (Pet. 6) that each case is determined by its particular historical circumstances and the actions and statements of the parties. Petitioner here, after failing in two courts below, merely seeks a third opportunity to convince someone that the local facts of this case support its position. Review by this Court is not designed for that kind of repetitive examination of the facts.

1. The Decision Below Is Consistent With This Court's Decision In United States v. Montana

Contrary to petitioner's argument (Pet. 4-8), the decision below does not conflict with *Montana*. In order to overcome the strong presumption against conveyance, a tribe must show a public exigency justifying the conveyance and must show that the parties' intent to include the bed "was definitely declared or otherwise made plain . . ." 450 U.S. at 552. The courts below scrupulously observed and applied those rules, determining only after a careful review of the evidence that this case overwhelmingly demonstrates the existence of facts which this Court has deemed sufficient to support a finding that a riverbed was included as part of the reservation.

In *Montana*, this Court gave *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), as an example of a set of facts which demonstrated the requisite intent to include land underlying navigable water 600 feet from the high tide line, even though the granting language referred only to "the body of *lands* known as Annette islands", 248 U.S. at 86 (emphasis added). 450 U.S. at 556. The creation and expansion of the Puyallup Reservation included all of the factors which were collectively deemed sufficient to show the required intent in *Alaska Pacific Fisheries:* the United States encouraged the Indians to

locate on the land; the Indians could not support themselves from the uplands alone; the Indians depended on fish to support themselves; the Indians both sold and consumed salmon; the purpose of the reservation was to set aside an area where the Indians could support themselves through fishing; the Indians naturally looked upon the fishing grounds as part of the reservation. 248 U.S. at 88-90. Moreover, our case has two additional factors demonstrating the required intent which were not present in *Alaska Pacific Fisheries:* explicit discussion by the negotiators of the importance of the river, and an additional public exigency — the desire to avoid further warfare with the Indians. In short, since this Court considers *Alaska Pacific Fisheries* to be a sufficient showing of the intent to include land underlying navigable water as part of a reservation, this case *a fortiori* demonstrates the required intent.

Far from conflicting with *Montana* then, this case fits comfortably into its teaching. Contrary to the Port's suggestion (Pet. 5), the Ninth Circuit in this case did not depart from the burden of proof required by *Montana* when it observed that treaties must be interpreted as the Indians would have understood them. 717 F.2d at 1257. First, that rule of interpretation is not inconsistent with *Montana:* it was applied by this Court in *Alaska Pacific Fisheries,* 248 U.S. at 89, the case cited with approval in *Montana.* More important, however, that rule did not determine the outcome here. The Ninth Circuit's mention of the rule, and of *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), appears only in a preliminary discussion of general legal principles. 717 F.2d at 1257. When it turned to the facts of this case, *Id.* at 1259-1261, the circuit opinion emphasized, as this Court required, the strong presump-

tion against conveyance (717 F.2d at 1257, quoting from *Montana*, 450 U.S. at 552), and that "the mere fact that the bed of a navigable water lies within the boundaries [of an Indian reservation] does not make the riverbed part of the conveyed land . . ." (717 F.2d at 1257, quoting from *Montana*, 450 U.S. at 554). Both courts below applied that very demanding burden of proof and ruled in favor of the Tribe only after finding that the detailed evidence "made very plain" the intention to convey the riverbed and that there was a public exigency justifying its inclusion. 717 F.2d at 1260. In short, the rule for interpreting treaties was neither necessary to nor the determining factor in the decision below.

Petitioner speculates that the Unites States would not have intended to include the riverbed because treaty language adequately protected the Tribe's fishing rights. Apart from the inadequacy of the fishing rights clauses to provide all of the legal protection which ownership provides, petitioner produced no evidence whatsoever, nor does any exist, that the federal representatives intended to exclude the bed for that reason, or in fact that they even thought of the two concepts as related. The Tribe, by contrast, adduced a wealth of evidence that the United States *did* intend to include the bed, for both fishing and non-fishing related reasons. It would be a cruel trick to assume without any supporting evidence, as petitioner asks us to do, that treaty language designed to *protect* the Indians sub silentio overruled the extensive evidence of intent to include the bed. That result would be particularly illogical here where the Tribe was more vitally concerned about its river than perhaps any other tribe with which the United States dealt. In any case, all of these matters which reflect on the parties' intent were fully

considered by both courts below and do not merit reexamination here.[4]

2. The Facts Were Thoroughly Examined By The Two Courts Below And Do Not Warrant Further Review

Since determination of the parties' intent, the key issue in this case, is a factual question, *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978), certiorari here is even less appropriate in light of "this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967) (citation omitted). The two-court rule has been applied in a wide variety of circumstances, including cases such as this one where the primary factual issue was the intent of one or more parties. *Rogers v. Lodge*, — U.S. —, 102 S.Ct. 3272 (1982). Petitioner has suggested no such compelling reason for abandoning this Court's policy.

3. There Is No Conflict With Any Other Court of Appeals Decision

The decision below is consistent with the pattern of cases decided by the lower courts since *Montana*. The de-

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[4] Petitioner's reference to this Court's discussion in *Montana* of "virtually identical" language in the Crow and Puyallup treaties (Pet. 5) is irrelevant here. First, this Court observed that that similarity was relevant to the jurisdictional issue involved in *Montana*, not the ownership issue. 450 U.S. at 560-561. Second, in this case the Puyallup Tribe does not rely on treaty language to demonstrate riverbed ownership; it relies on the negotiations leading to the subsequent executive order and the vast array of other evidence produced at trial. 717 F.2d at 1260, n. 9.

cisions have applied the rules announced by this Court to a variety of factual settings. In those cases where the requisite showing of intent has been made, the courts have ruled in favor of the tribes. *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 314 (1982); *United States v. Washington*, 694 F.2d 188 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 3536 (1983); *Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd.*, 713 F.2d 455 (9th Cir. 1983) *(petition for cert. pending)*. Where that intent has not been adequately demonstrated, the rulings have gone against the tribes. *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 423 (1983); *Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983), *cert. denied*, — U.S. —, 103 S.Ct. 3537 (1983).[5]

The decision below does not conflict with *United States v. Aranson, supra*, (Pet. 7), and even if there were such a conflict, *Supreme Court* Rule 17.1(a) would not counsel a grant of certiorari because the decisions come from the same circuit. *Aranson* and this case together indeed demonstrate the Ninth Circuit's adherence to the standards set forth in *Montana* rather than any conflict. The tribe involved in *Aranson* was simply not "so dependent on the river that Congress would have intended to . . . convey the river bed." 696 F.2d at 666. The *Aranson* panel noted, however, that under facts paralleling those of *Alaska Pacific Fisheries*, a tribe can prevail in its claim of ownership and cited the district court's opinon

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[5] The decision below does not conflict with *Baker*, which emphasized (1) that the reservation was created *after* Wisconsin became a state and (2) that there was nothing in the record to show the requisite intent. 698 F.2d at 1335. The history of the Puyallup Indians and Reservation are entirely the opposite in both respects.

in this case as an example. *Id.* at 665-666. The Court of Appeals in this case in turn cited *Aranson* with approval. 717 F.2d at 1261. There is thus no conflict between the decisions.

4. There Is No Conflict With Any Ruling Of the Washington Supreme Court Nor Any State Law Issue Justifying Certification

Petitioner argues that under Washington law the land exposed by an artificial rechannelization project "accretes to the adjoining uplands", relying on one state court of appeals case, *Strom v. Sheldon*, 527 P.2d 1382 (Div. 2 1974) (Pet. 9). The Ninth Circuit correctly held that the state court of appeals decision dealt with a different factual situation and a different legal principle than our case presents. 717 F.2d at 1262-1263. The Washington Supreme Court has consistently held that a government rechannelization project constitutes avulsion which does not change property boundaries. *Ghione v. Washington*, 175 P.2d 955 (1946); *Hill v. Newell*, 149 P. 951 (1915). The state court of appeals could not and did not purport to overrule those state supreme court decisions and create a "radical abandonment of well-settled principles governing real estate boundaries." 717 F.2d at 1263.

5. Petitioner's Remaining Arguments Are Incorrect And Do Not Merit Review

Argument number 2 (Pet. 9) fails for several reasons. First, the Puyallup Reservation is a treaty reservation. Treaty of Medicine Creek, Article 2. (Pet. App. A-2.) The Executive Order which expanded the Reservation to add the river and its bed was issued pursuant to Article 6 of the Treaty. (Pet. App. A-3.) Moreover, even if it were considered an executive order reservation, the

Tribe's title vis-a-vis the petitioner would be just as effective as a treaty or statutorily-created reservation, *Donnelly v. United States,* 228 U.S. 243, 256 (1913); *Cohen's Handbook of Federal Indian Law* (1982 Ed.), p. 493, which is in turn "as sacred and securely safeguarded as is fee simple absolute title." *United States v. Shoshone Tribe,* 304 U.S. 111, 117 (1938). The cases upon which petitioner relies (*Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949) and *Sioux Tribe v. United States,* 316 U.S. 317 (1942)) limit only the right of compensation when the United States rescinds the grant of a reservation. No such rescission or claim for compensation is involved here, and even if one were, it would have no bearing on the issue the petitioner contests: whether the executive order conveyed title in 1857.

Neither does petitioner's reference (Pet. 8) to *Puyallup Tribe v. Washington Department of Game,* 433 U.S. 165 (1977) *("Puyallup III")* merit this Court's review. As the Ninth Circuit noted, the language of that decision demonstrated this Court's awareness that riverbed ownership was not an issue and was not decided. 717 F.2d at 1261, n. 10. Further, it was not an issue at any other stage of that litigation, either in this Court or in the state courts. The "uncontradicted findings" mentioned in footnote 12, 433 U.S. at 174, referred to the state court decision in *Puyallup I* which likewise never addressed the issue of riverbed ownership 422 P.2d 754, 759 (Wash. S.Ct. 1967). The state court was discussing, in the referenced passage, land sales made by allottees who, as a matter of law, *Montana, supra,* 450 U.S. at 551; *Shively v. Bowlby,* 152 U.S. 1, 48 (1894), as well as under the facts of this Reservation, did not have the riverbed as part of their allotments

and therefore could not have sold it. Moreover, petitioner conceded in the district court that allotments on the Reservation did not include the riverbed (which of course means that any sale of an allotment did not include the bed) and that neither the Tribe nor the United States has ever conveyed the riverbed. 525 F.Supp. at 76, Conclusion of Law 16; Pre-Trial Order, Uncontested Facts 29 and 30.[6]

As the Ninth Circuit noted, the courts have already disposed of petitioner's argument that the Puyallup Tribe was created following the Indian Reorganization Act. (Pet. 9.) 717 F.2d at 1261, n. 10. In addition, the Tribe could easily have presented the factual material which would have verified once again that it has continuously existed since the Reservation was created. We had no idea that that would be necessary, however, because the Port did not raise the argument as a "Disputed Fact," "Issue of Fact," or "Issue of Law" in the pre-trial order.

Argument number 5 (Pet. 10) makes no attempt to refute the Ninth Circuit's careful analysis which concluded that joinder of the State of Washington was not required by F.R.C.P. 19. 717 F. 2d at 1254-1256. It is not

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[6] 29. . . . . There is nothing to indicate that either the United States or the Tribe intended to include the bed in any allotments. . . . .

30. With the possible exception of the State of Washington's admission to the Union, the effect of which the parties dispute, no other federal or tribal action prior to the Corps channelization project described below purported or attempted to convey any interest in that portion of the bed of the river in the vicinity of the property involved in this case.

Pre-Trial Order, page 12.

clear why petitioner seeks that joinder since it would only gain another adversary. In any case, petitioner does not suggest, even if its argument were correct, why certiorari would be appropriate.

CONCLUSION

The decision of the two courts below is a factual determination based on the legal standards promulgated by this Court in *Montana* and *Alaska Pacific Fisheries*. The petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN HOWARD BELL

Attorney for Respondent
Puyallup Indian Tribe

January, 1984

83-958

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1983

PORT OF TACOMA,

Petitioner,

v.

PUYALLUP INDIAN TRIBE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the absence of clear language confirming such a grant, is the mere historical dependence on the fishery resource contained in navigable waters within an Indian reservation established by executive order sufficient to overcome the established presumption against the conveyance of lands underlying such navigable waters?

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TREATY PROVISION

STATEMENT OF INTEREST OF AMICUS CURIAE

The Prosecuting Attorney for Kitsap County believes that the decision below, and the Petition for Writ of Certiorari submitted on behalf of Port of Tacoma, raise important issues concerning the ownership of real property underlying and adjacent to navigable waters, and the resulting issues concerning the exercise of state and local sovereign authority over activities thereon. A substantial portion of Kitsap County lies adjacent to the navigable waters of Puget Sound, waters which have previously been identified as usual and accustomed grounds for fishing rights of various Indian tribes of the Pacific Northwest. Kitsap County previously appeared as amicus curiae in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), and

contains within its boundaries the Port Madison Indian Reservation, occupied by the Suquamish Indian Tribe, said tribe having made ownership claims of a nature similar to those made by the Puyallup tribe in this case. Kitsap County is not and never has been a party to this suit, but is familiar with the issues presented.

REASONS WHY WRIT SHOULD ISSUE

I. The decision below is inconsistent with this Court's decision in Montana v. United States.

In Montana v. United States, 450 U.S. 544 (1981), the Court reaffirmed the rule of United States v. Holt State Bank, 270 U.S. 49 (1926), and the heavy presumption against conveyances of property underlying navigable waters. Of particular importance to this case is the Court's

conclusion that general language preserving rights of hunting, fishing and passage, and language authorizing exclusive occupation, does not overcome this presumption. Finally, the Court analyzed and distinguished as exceptional the case of Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) in which a plurality of this Court held, based on the peculiar historical circumstances and treaty language involved, that the reservation grant did include the bed of a navigable river. Montana v. United States, supra, 450 U.S. at 555, fn. 5.

By contrast, in this case, the Ninth Circuit Court of Appeals has elevated to a level of at least equal importance the principle of statutory construction that "treaties with the Indians must be interpreted as they

would have understood them, . . .and any doubtful expressions in them should be resolved in the Indian's favor." Puyallup Indian Tribe v. Port of Tacoma, supra, 717 F.2d 1251, 1257 (9th Cir. 1983). In an effort to "accord appropriate weight to both" this rule of statutory construction and the legal presumption against conveyances of beds of navigable waters, the Court concluded at page 1258:

> . . .that where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.

This approach is obviously inconsistent with Montana. While the

principles of statutory construction played little, if any, role in the decision in Montana, they are virtually outcome determinative in the Ninth Circuit view since the government's awareness of the Indians' use of a water resource, when coupled with this rule of construction, is sufficient without more to overcome the Holt State Bank presumption.[1]

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[1]Interestingly, the Ninth Circuit failed to contrast the language actually used in the creation of this reservation with that used in conjunction with other reservations of this era and geographical location. For example, the executive orders used to identify both the Tulalip and Lummi Reservations on Puget Sound in 1873 contain specific calls to low-water marks establishing boundaries along bodies of navigable waters. United States v. Romaine, 255 Fed. 253 (9th Cir. 1919); United States v. Snohomish River Boom Co., 246 Fed. 112 (9th Cir. 1917). The failure to make similar specific reference in the order reestablishing the Puyallup Reservation is obviously probative of an intent not

The Ninth Circuit's reliance on Choctaw Nation is clearly misplaced. While that case was resolved on the basis of highly peculiar historical circumstances, as well as unusually specific treaty language providing that none of the lands involved would become part of any state or territory, and while these distinguishing features were made clear in Montana, the Ninth Circuit has adopted its rule of statutory construction on a level of at least equal importance with Holt State Bank and the long standing equal footing doctrine. The court below has simply failed to recognize Choctaw Nation as the "singular exception" in an

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to convey lands beneath the Puyallup River -- consistent with equal footing doctrine and the Holt State Bank presumption in favor of state sovereignty.

"established line of cases." Montana v. United States, supra, 450 U.S. at 555, fn. 5.

Finally, the circumstances surrounding the Puyallup reservation are in no way similar to those presented in Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918). While Article II of the Treaty of Medicine Creek reserved certain lands for Indian occupation, Article III went further and secured to the Indians the right of taking fish "at all usual and accustomed grounds and stations." Article III has since been held to require an allocation of the fishery resource between Indians and non-Indians; Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979); as well as a requirement that both the tribes and the State take

reasonable measures to preserve and enhance the fishery resource. United States v. Washington, 694 F.2d 1374 (9th Cir. 1982), rehearing pending, 704 F.2d 1141 (9th Cir. 1983).

Thus, regardless of whether their reservation carried title to the bed of the Puyallup River under Article II, the Puyallup Indians were and are assured of access to the fishery resource upon which they have found to be dependent. This not only distinguishes the Puyallups from the Metlakahtal Indians occupying the Annette Islands (who apparently had no independent fishery resource rights), but further suggests there is no basis for overturning the Holt State Bank presumption against conveyances of beds underlying navigable waters. If the resource access needs of the Indians

were to be fulfilled under Article III, there would have been no reason to convey title to the beds underlying those "usual and accustomed" waters. In its decision in this case, the Ninth Circuit has failed to recognize that, contrary to the situation in Alaska Pacific Fisheries, the resource access needs of the Indians were provided for in a manner consistent with the Holt State Bank presumption.

In short, the Ninth Circuit decision in below is inconsistent with the principles announced in Montana v. United States, supra, and the Writ of Certiorari should issue.

II. The decision below is inconsistent with the decision of another panel of the Ninth Circuit Court of Appeals in United States v. Aranson.

In United States v. Aranson,

696 F.2d 654 (9th Cir. 1983), cert. denied, ___ U.S. ___ (November 14, 1983), the Ninth Circuit Court of Appeals was required to determine the title to a portion of the bed of the Colorado River along the western boundary of the Colorado River Indian Reservation. With reasoning similiar to Port of Tacoma, the original opinion found the river bed to be part of the reservation. That opinion was withdrawn in light of Montana v. United States, supra, and the court ultimately reached precisely the opposite result. The Aranson court specifically recognized that Montana rejected an approach which determined title on the basis of elementary rules of statutory interpretation concerning Indian tribes and their understanding of treaties. United States v. Aranson, supra, 696

allotments for private ownership indicated an intent not to abrogate the presumption against conveyances. While the Puyallup Reservation has been largely disintegrated through extensive allotment; Puyallup Tribe v. Department of Game of the State of Washington, 433 U.S. 165, 174 (1977); there is no recognition that for reservations destined for assimilation into non-Indian communities; Montana v. United States, 450 U.S. at 559; Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962); there would be no purpose in abrogating state sovereignty.

Thus, in numerous areas, the decision below is inconsistent with the Seventh Circuit decision in Wisconsin v. Baker, and a Writ of Certiorari should issue to resolve that conflict.

IV. The decision below

provides for an inappropriate means of determining ownership of real property.

Under the holding in Port of Tacoma, the ownership of real property is dependent upon judicial determinations as to the dietary and subsistence needs of communities in existence more than one hundred years ago. Obviously, these decisions are based upon differing perceptions and opinions as to the degree of dependence, as illustrated by the trial court's findings, and subsequent review thereof, in Montana v. United States, supra, 450 U.S. at 570 (Blackman, J. dissenting). The ownership of real property is an area of law where the interests of certainty and finality are paramount. Even the Ninth Circuit Court of Appeals has recognized the importance of these property ownership questions and has

suggested review by this Court given the uncertainties involved. United States v. Washington, 694 F.2d 188, 189 (9th Cir. 1982), cert denied, ___ U.S. ___ (June 27, 1983). The Ninth Circuit formulation leaves questions of real property ownership in a highly uncertain and speculative posture which can only work to the eventual detriment of the tribes, the states, and the successors in interest of each.

This nation was founded on the beliefs that it is better to distribute power evenly than unevenly throughout a union of states, and that a local government is better able than a national government to promote public welfare in matters of local concern. In exceptional circumstances, Congress may depart from its usual course with an assessment of the degree to which the

interests of interstate and foreign commerce and local control of the public welfare should be diminished to serve a more paramount purpose. The Ninth Circuit rule, however, is destined to have a substantial adverse effect on state sovereignty in western states where Indian tribes were located and relocated in areas of ready access to the very rich natural resources of the public waterways. The opportunity for Congress to weigh the relative merits of state sovereignty and the peculiar needs of individual tribes is lost under the Ninth Circuit formulation, and the interests behind the equal footing doctrine are substantially diminished as a result.

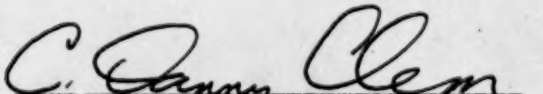
CONCLUSION

For the foregoing reasons, amicus curiae Kitsap County urges that a

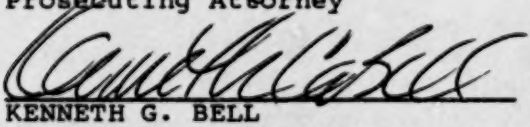
Writ of Certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

DATED this 5th day of January, 1984.

Respectfully submitted,



C. DANNY CLEM
Prosecuting Attorney



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PROOF OF SERVICE

STATE OF WASHINGTON)
: SS
County of Kitsap)

C. DANNY CLEM, having first been duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action and competent to be a witness therein.

That on the 5th day of January, 1984, he deposited in the mails of the United States of America, postage prepaid, the original and forty (40) copies of the Brief of Amicus Curiae in Support of Petition for Writ of Certiorari to the Clerk of the United States Supreme Court, U.S. Supreme Court Building, 1 First Street, Washington,

D.C. 20543 and one (1) copy of the same to John Howard Clinebell, Attorney at Law, Office of Puyallup Indian Tribe, 2215 East 32nd, Tacoma, Washington 98404 and to James J. Mason, Attorney at Law, 1008 South Yakima Avenue, Tacoma, Washington 98405.

C. DANNY CLEM

SUBSCRIBED AND SWORN to before me this 5th day of January, 1983.

NOTARY PUBLIC in and for the State of Washington, residing at Bremerton.

NO.83-958

IN THE SUPREME COURT OF THE UNITED STATES October Term, 1983

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admission to the Union, applicable to a navigable river located within the boundaries of an Indian reservation, under the following circumstances:

(1) The treaty originally establishing the reservation makes no reference, express or implied, to ownership of the beds and shores of navigable waters;

(2) The treaty does, however, expressly recognize the undisputed historical dependence of the Tribe's members upon fishing, by reserving to them the right to fish at all their usual and accustomed fishing grounds in common with non-Indians;

(3) The river in question was not included within the reservation boundaries as originally established by the treaty, but only within the reservation boundaries as expanded by a subsequent executive order;

(4) The executive order makes no reference, express or implied, to ownership of the beds and shores of the river; and

(5) All uplands adjacent to the river have been alienated to non-Indians.

DECISIONS BELOW

The decision of the Ninth Circuit Court of Appeals affirming the district court's ruling that the bed of the Puyallup River belongs to the Puyallup Tribe is found at 717 F.2d. 1251. The district court opinion is found at 525 F. Supp. 65 (1981).

STATEMENT OF INTEREST OF AMICUS CURIAE

This case involves a dispute over the ownership of a parcel of land which was formerly part of the bed of the Puyallup River in Pierce County, Washington. Through channelization of the Puyallup River, the land is now dry, and is being used by various private

businesses under lease from the petitioner, Port of Tacoma.

Although the State is not a party to this action, its immediate interest is as great as if it were.[1] As the Court of Appeals itself recognized, if the United States does not own the parcel in question in trust for the Puyallup Tribe, then ownership is - or at least was - in the State. See: 717 F.2d at 1258. (Whether the State has lost ownership of the original bed to the Port would have to be resolved, in a separate action, in accordance with applicable state law.)[2]

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1 In the district court, the State took the position that it was a necessary party under Fed. R. Civ. P. 19(a), in a brief as amicus curiae submitted in response to the district court's request. Nevertheless, before any of the existing parties moved to bring the State in as an additional defendant, the district court ruled on the merits. The Court of Appeals upheld the district court's decision to leave the State out. See: 717 F.2d at 1254.

2 In any event, lest there be any

Since the State was not a party, it remains theoretically open to the State to challenge the ownership of the United States in a subsequent action, as the Court of Appeals recognized. Ibid. As a practical matter, however, this present action will be dispositive of the claims of both the State and the Port, since it can hardly be expected that the Court of Appeals will overrule its own determination in this case.

But the State has much more at stake than just the parcel involved here. In the State there are some 25 Indian reservations, with most having navigable rivers running through them or tidelands adjoining them. And the State's title to these aquatic lands is under challenge by

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misunderstanding, the State does not also claim title to the present, channelized, bed of the river under the Equal Footing Doctrine. We do not invoke that doctrine to have both worlds.

the United States and various Indian tribes in other cases besides this one, all pending in the District Court for the Western District of Washington. See: United States v. Burlington Northern Inc., Nos. C76-550V, C77-117V, C78-429V and C80-386V; United States v. Cascade Natural Gas Corporation, No. C82-1443; Suquamish Indian Tribe v. Aam, No. C82-1549V; United States v. Aam, No. C82-1522V.

These aquatic lands are of critical importance to the citizens of Washington because of their ecological, environmental, recreational and economic uses and, therefore, their potential for enhancement of the public good. Such aquatic lands occupy a special legal status as "sovereign" lands which have been recognized by both Congress and this Court. See: Submerged Lands Act, 43 U.S.C. § 1301, et seq. at §

1311(a); Montana v. United States, 450 U.S. 544, 551 (1981); Illinois Central Ry. v. Illinois, 146 U.S. 387, 452, 455 (1892). These special and unique public property interests are the subject of this appeal, and have been placed in serious risk by the decision below. This risk arises from the misreading and misapplication of Montana, supra, by the Court of Appeals. Under the opinion of that Court, Washington's aquatic land base may be substantially diminished simply upon a finding that the waters over those lands provided a major part of the aboriginal diet of the Indians.

This result would occur, as we shall see, even though the language of the treaty or other instrument creating the reservation in no way "definitely declares or otherwise makes plain . . ." an intent to divest the future State of its ownership of these aquatic lands.

Montana v. United States, supra, at 552. Further, this divestiture would occur even though it was in no way necessary to assure this food supply to the Indians at treaty time and is in no way necessary now, because of express treaty guarantees of this food supply. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

REASONS WHY THE WRIT SHOULD ISSUE

A. States receive title to the beds and shores of all navigable waters including those within Indian reservations as sovereign lands unless Congress expresses a contrary intent in a treaty or statute creating an Indian reservation.

1. The Constitutional Starting Point.

In Montana, this Court reaffirmed the principle that the federal government

held the land beneath navigable waters in trust for future states, and that such land would be granted to those states when they entered the Union. This principle is commonly referred to as the Equal Footing Doctrine. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). The underpinnings of the Equal Footing Doctrine are: (1) that ownership of land under navigable waters is an incident of sovereignty; and (2) that new states should assume sovereignty and enter the Union on an equal footing with the established states. Montana, supra, 450 U.S. at 551.

The Equal Footing Doctrine, however, has exceptions, all designed to allow the federal government to perform the functions which the Constitution assigns to it. The federal government may deprive future states of the lands to which they would otherwise be entitled if

an international duty or public exigency so requires. United States v. Holt State Bank, 270 U.S. 49, 55 (1926). But because the Equal Footing Doctrine is embodied in the Constitution itself, nothing less will suffice in order to provide an exception to it. It must be definitely clear that Congress intended an exception, and that adequate grounds for the exception exist. United States v. Holt State Bank, supra, 270 U.S. at 55.

2. The Application of Montana to This Case: There is No Clear Indication of Intent to Define the Status of the Bed of the Puyallup River.

In Montana this Court held that the language in the Treaty of Fort Laramie, which prohibited all persons (except government agents) from passing over, settling upon or residing within the reservation, was not strong enough to

overcome the presumption against conveyance of a riverbed even though the river was within the boundaries of an Indian reservation.

Montana is consistent with the rule, also based upon the Equal Footing Doctrine, that general legislation pertaining to public lands does not convey tidelands or beds of navigable waters unless the contrary is clearly indicated. Mann v. Tacoma Land Co., 153 U.S. 273 (1894); McGilvra v. Ross, 215 U.S. 70 (1909).

The Treaty of Medicine Creek involved here and the Treaty of Fort Laramie involved in Montana are "virtually identical". Montana, supra, 450 U.S. at 560. The conclusion inevitably follows that the Treaty of Medicine Creek similarly lacks the specific language necessary to have conveyed the bed and shores of the

Puyallup River to the Puyallup Tribe contrary to the decision of the court below.

The United States, of course, could cede to an Indian tribe beds and shores of navigable waters held by it as the paramount sovereign, under the exceptions to the Equal Footing Doctrine. Shively v. Bowlby, 152 U.S. 1, 48 (1894). The critical questions here are: (1) Did the United States clearly intend to do so? (2) Was there a public exigency for so doing?

When in 1857 the President of the United States set aside the enlarged Puyallup Reservation which encompassed the Puyallup River he used no language reserving for the Tribe submerged lands lying beneath navigable waters. Executive Order, January 20, 1857. 1 Kappler 922 (1904). Yet the Puyallup Tribe was a political body for whom the

3. The "Public Exigency" Issue.

Neither the Court of Appeals nor the district court actually purported to find in the Treaty or Executive Order what obviously is not there: a clear expression of intent that the riverbed is to belong to the Tribe. As candidly admitted by the district court:

> "The court is aware that there is no language in the Treaty of Medicine Creek of 1854 and 1855 or in the Executive Order of January 20, 1857 that definitely declares or otherwise makes plain any intention to convey, nor are there any express conveyances that expressly conveyed or referred to the bed of the Puyallup River." 525 F. Supp. at 68.

The court below, following the district court's approach, avoided this embarrassing problem by invoking the shibboleth of "public exigency" based upon the notion that the Executive Order of January 20, 1857 was intended to avoid war between the Puyallup and the white

settlers then moving into Washington Territory. Whether the enlarged reservation established by Executive Order was necessary in order to avoid war is not the issue, however, even under that theory. The issue, rather, is whether it was necessary to give the Tribe the bed of the Puyallup River within the boundaries of that reservation in order to avoid war. And neither the opinion of the court below nor that of the district court purport to show that it was.

The second way the court below sought to shelter its conclusion under the "public exigency" exception to the general rule was by pointing to the dependence of the Puyallups upon fishing as a source of food and as a part of their lifestyle. That such dependence existed we do not dispute. But this reasoning is fallacious, nevertheless,

because Article III of the Treaty of Medicine Creek secures fishing rights to these Indians to take up to fifty percent of anadramous fish runs passing through traditional fishing grounds. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. den. 423 U.S. 1086 (1976). The decision to allocate fish runs between Indians and other citizens was substantially upheld by this Court in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). There was no need or "exigency" for Indians to receive title to the beds and shores of navigable waters to further their fishing activities or protect their fishing rights.

In addition, we would suggest that if the court below is correct in its conclusion (i.e., that historic

dependence upon fishing by Indians overcomes the presumption against conveyance of such aquatic lands to a state) the Equal Footing Doctrine will be in large part inapplicable to the State of Washington. As previously stated, many of the twenty-five Indian reservations in the State of Washington include portions of navigable rivers within their boundaries and have adjoining tidelands. Most if not all of the tribes have historically used the rivers and tidelands as food sources to some extent. Under the Ninth Circuit's approach, many of these rivers and much of the tidelands would be subject to claims of Indian ownership simply because of this historical fact.

The lower court opinion relies heavily upon Alaska Pacific Fisheries v. Untied States, 248 U.S. 78 (1918), which construed an Act of Congress

setting aside for Indian use "the body of lands known as Annette Islands" in the then Territory of Alaska. The Indians who were given the Annette Islands as a home had previously migrated from British Columbia. The requisite congressional intent to convey to them the beds and shores of adjacent waters was based upon the notion that to exclude such fishing areas would defeat their ability to obtain a food supply and a livelihood. For these Indians, unlike the Puyallups and many other Washington tribes, had no treaty right to fish anywhere and thus had no treaty guaranty of a livelihood. This circumstance provided the basis for imputing an intention to Congress "to conform its action to their situation and needs". 248 U.S. at 89.

The lower court's reliance upon Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), is similarly misplaced. Choctaw

interpreted the Treaty of Dancing Rabbit Creek which said that the described tribal lands would not become a part of any state or territory. Requisite intent was found, based on this language, to convey title to the beds of a navigable river in fee simple to the Indians. 397 U.S. at 625.[4]

B. Rulings by the Courts of Appeals have reached inconsistent results in applying Montana's rationale.

The Seventh Circuit Court of Appeals has interpreted the Montana case as a reaffirmation of the Equal Footing Doctrine. Thus, in Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983), it affirmed a lower court judgment that the 1854 Chippewa Treaty did not confer upon the Indians the exclusive right to fish and hunt in the waters of navigable lakes

4 Montana distinguishes the Choctaw decision on this very ground. 450 U.S. at 455-56, n. 5.

within the boundaries of the reservation. The Seventh Circuit concluded that neither the language nor history of the Chippewa Treaty was sufficient to overcome the presumption against conveyance of the lake bed. Baker, supra, 698 F.2d at 1335.

The Ninth Circuit's interpretation of Montana in this case is inconsistent with the Seventh Circuit decision in Baker.

Further, the Ninth Circuit's interpretation of Montana is not consistent within the Circuit itself. This should be of no concern of this Court, we would agree, were it not for the fact that this inconsistency involves a pivotal question. The normal canon of construction for treaties, statutes, and other instruments involving Indians is that they are to be construed as the Indians understood them and that

ambiguities are to be resolved in the Indians' favor. Does this canon apply in cases such as this involving a state's claim to aquatic lands under the Equal Footing Doctrine? In United States v. Aranson, 696 F.2d 654 (9th Cir. 1983), cert. den. ____ U.S. ____, 104 S. Ct. 423 (1983), another panel of the Ninth Circuit held that this canon did not apply.[5]

In contrast, the panel in this case

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5 As stated by the panel in Aranson: "Turning to the facts in the present case, even the strongest language in the various official documents defining the reservation's western boundary fall short of the specificity required by Montana. We conceded in our earlier opinion (subsequently withdrawn by the panel for reconsideration in light of Montana) that the first Executive Order issued in 1873 delineating the bounds of the reservation as ambiguous. It established the western boundary of the reservation only vaguely as 'bounded on the west by the Colorado River'. We nevertheless construed the ambiguity in favor of the tribes - an approach Montana rejects." 696 F.2d at 644.

holds that this canon of construction is applicable in these cases, stating:

> "Nor did it [the Court in Montana] gainsay the equally important proposition set forth in Choctaw Nation that 'treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor.'" 717 F.2d at 1257.

Because this critical difference has such historical importance in resolving not only this case, but similar disputes which are either now pending or likely to arise in the future, this issue now ought to be resolved by this Court.

C. Executive Orders do not convey title to Indian tribes.

The court below also erred by concluding that the Executive Order of January 20, 1857 conveyed title to the Puyallup Indians. 717 F.2d at 1261, n. 10. This Court has repeatedly ruled that Executive Orders do not convey title

to lands set aside for Indians. Hynes v. Grimes Packing Co., 337 U.S. 86 (1949); Sioux Tribe v. United States, 316 U.S. 317 (1942).

D. The decision of the court below is contrary to the decision of this Court in Puyallup III.

The ownership of the bed of the Puyallup River is an issue that has already been before this Court. In Puyallup Tribe v. Washington Game Department, 433 U.S. 165 (1977), (Puyallup III), a central issue was the applicability of the "exclusive use" language of Article II of the Treaty of Medicine Creek to lands within the reservation and to the Puyallup River itself. As stated by the Court:

> "The Tribe vigorously argues that the majority of its members' netting of steelhead takes place inside its reservation.
>
> . . .

> "Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was to be 'set apart, and, so far as necessary, surveyed and marked out for their exclusive use' and that no 'white man [was to] be permitted to reside upon the same without permission of the tribe and the superintendent or agent.' It is argued that these words amount to a reservation of a right to fish free of state interference. Such an interpretation clashes with the subsequent history of the reservation. None of the 22 acres abuts on the Puyallup River.[12] Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use'." 433 U.S. 173, 174.

In footnote 12, the Court had more to say about the river:

> "Counsel for petitioner [Puyallup Tribe] intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr of Oral Arg 10. This contention is at odds with the otherwise uncontradicted findings below." [i.e., the findings that all but 22 acres had been alienated]

Yet the Court of Appeals - and the

NO. 83-958

IN THE
Supreme Court of the United States

OCTOBER TERM 1983

PORT OF TACOMA,

Petitioner,

vs.

PUYALLUP INDIAN TRIBE

Respondent.

MOTION TO FILE AMICUS CURIAE BRIEF BY WASHINGTON LAND TITLE ASSOCIATION AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Washington Land Title Association

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COMES NOW the Washington Land Title Association and files this, its Motion for Leave to File the attached amicus curiae brief and Motion in Support of the Port of Tacoma's Petition for Certiorari. Movant states:

The Washington Land Title Association is an association of title insurance companies whose members insure land titles within and adjacent the external boundaries of approximately 24 Indian reservations or former reservations in the State of Washington. All the reservations include lands adjacent navigable waters. Many abut tidelands long ago deeded into private ownership by the State of Washington which are now being asserted by tribes, including the Puyallup Indian Tribe, to have been impliedly included within the external boundary of their reservations.

Movant has a direct interest in the issues involved in this proceeding because of

the great importance of certainty where issues to record ownership of real property are involved. The rule of law announced by the Ninth Circuit in this and in the companion case, Muckleshoot Indian Tribe vs. Transcanada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983), appears to be in direct conflict with the teaching of this court in Montana vs. United States, 450 U.S. 544 (1981).

While the instant decision affects 12 acres of land, approximately 200 additional acres of industrialized former Puyallup river bottom land are directly effected. Indirectly long-established titles derived from the State of Washington to numerous other parcels of real estate resulting from rechannelization of rivers and filling of tidelands bounding or within the boundaries of reservations will be uncertain and in jeopardy unless this court grants certiorari and reviews the instant case in

light of the court's decision in Montana, supra. The Ninth Circuit has invited this court's review of its interpretation of the Montana decision.

> Given the importance of certainty where issues of ownership of land are involved, the possibility of conflict suggested by Justice Rehnquist warrants consideration of the issue by the Supreme Court.
>
> United States vs. State of Washington, 694 F.2d 188, 189 (9th Cir. 1982), referring to Confederated Salish and Kootenai Tribes vs. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied 103 S.Ct. 314 (Rehnquist, J., dissenting).

Movant has received written consent of the Port of Tacoma to file an amicus brief, but has not yet received the consent of the respondent, Puyallup Indian Tribe.

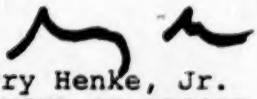
CONCLUSION

The Washington Land Title Association believes that the Ninth Circuit has incorrectly interpreted this court's teaching in Montana, supra, in both this and the companion Muckleshoot case and urges that the

decisions below be reviewed by this court. Accordingly, movant respectfully moves that the petitioner's Petition for Writ of Certiorari be granted and that it be permitted to file its Amicus Curiae brief herein.

Respectfully submitted,

SKEEL, HENKE, EVENSON & ROBERTS



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INTRODUCTION

In this action, the Court of Appeals held that, in view of the same tribal dependence on the Puyallup River addressed by Article III of the Treaty of Medicine Creek (10 Stat. 1132 (1854)), the 1857 Executive Order relocating the Puyallup reservation must be interpreted as including a grant to the tribe of the bed of the river flowing through it. The Order described it only by reference to Stevens' diagram of its proposed boundaries (January 20, 1857, reprinted at 1 Kappler 920). Such a grant was, if made, contrary to the historic practice of the Federal government to hold the land below the high-water mark along navigable waters for the future states unless a public exigency required it be conveyed. Shively vs. Bowlby, 152 U.S. 1 (1893). That practice is reflected in the presumption that a

pre-statehood grant should not be interpreted to include the conveyance of the bed of a navigable water "unless the intention was definitely declared or otherwise made plain." Montana vs. United States, 450 U.S. 544, 552 (1981), quoting United States vs. Holt State Bank, 270 U.S. 49, 55 (1926).

A specific provision of each of the treaties of 1854 and 1855 with the Indian Tribes of Western Washington[1] secured to the party tribes the "right of taking fish, at all ususal and accustomed grounds and stations . . . in common with all citizens of the territory." 10 Stat. 1133; see, generally, Washington vs. Fishing Vessel Association, 443 U.S. 658 (1979). Each tribe has a class right to a share up to one-half of the total harvest of each anadromous fish

---

[1] Treaty of Medicine Creek (10 Stat. 1132); Treaty of Point Elliott (12 Stat. 927); Treaty of Point No Point (12 Stat. 933); Treaty of Neah Bay (12 Stat. 939); and Treaty of Olympia (12 Stat. 971).

run sufficient for the subsistence and ceremonial needs of its members and for their livelihood, together with the concomitant right to access to the fishing grounds. Both the tribe's allocation of the harvest and its right of access to the traditional grounds are independent of the place of taking, on reservation or off. Id. at 687-9; United States vs. Winans, 198 U.S. 372 (1904). In particular, the right of the Puyallup Tribe to fish on the Puyallup River is a function of Article III. Puyallup Tribe vs. Washington Game Department cases, 391 U.S. 392 (Puyallup I); 414 U.S. 44 (Puyallup II); 433 U.S. 165 (Puyallup III). This key treaty provision addresses the same tribal concerns which were central to the decision of the court below, but it was not considered pertinent in the court's opinion.

I. Inference of a grant of title in the bed of a navigable water is not permitted absent specific treaty language or a clear promise in the treaty negotiations indicating that intent.

The inference of a grant to a Tribe of the fee interest in the bed of a particular watercourse in order to protect its dependence on the fishery therein is illogical, where the tribe already has a separate guarantee of those fishing rights. In the context of such a guarantee, access to the water and exclusive possession of the land around it is now and was in 1857 entirely sufficient to meet that concern.

The most tenuous such inference this court has made was in Choctaw Nation vs. Oklahoma, 397 U.S. 620 (1970). See Montana, 450 U.S. 544, 567-9 (J. Stevens, concurring). In that case the court relied on a specific promise that "no part of the land granted to them shall be embraced in any future territory or state." Supported by a history of dispossession from previous reserves

(without analogy here), that promise was held to permit an inference that the bed of a navigable water in the reservation was within the grant. The court in Montana stressed the absence of any similar promise or history, 450 U.S. at pages 555-6, note 5, and there is no similar promise or history present in this case.

Likewise, in this case the record reveals no circumstances which would logically give particular reference to submerged land to a promise that the reservation be "sufficient for [the tribe's] wants." Such a promise was the factor which the 9th Circuit held crucial in Moore vs. United States, 157 F.2d 670, 672 (1946). That promise in Moore was given flesh by the recognized dependence by the Quillayute Tribe on the title lands and bed of the Quillayute River for their primary subsistence and for the development of a recognized commercial tribal industry (for seal skins and whaling,

as well as salmon curing and smoking). Absent here is any promise of economic sufficiency to be derived from particular shoreland in the reservation, apart from the resources guaranteed by the fishing rights treaty clause to the tribe in all the waters inside and outside the reservation. Nor do the circumstance supply such a reference to the general promise made of "a reservation on the Puyallup." There is no evidence of any Puyallup Tribal industry in historical times requiring particular and recognized use of land below the high water mark, as was the case in Moore and, that case emphasized, in Alaska Pacific Fisheries vs. United States, 248 U.S. 78 (1918). See Moore, 157 F.2d at page 762. This case is parallel in this respect to Skokomish Indian Tribe vs. France, 320 F.2d 205, 212 (9th Cir. 1963).

The Court of Appeals below apparently relied on Alaska Pacific Fisheries for the conclusion that a public exigency alone,

without any promise or language to suggest a specific grant of submerged land in answer to it, may support the inference that the tideland was conveyed in a general reservation designation. The Act there construed the description of the reserve for an Alaska tribe as "the body of lands known as Annette Islands." Those words would include these within the ordinary meaning of the name of the group of islands used in the Act to designate the reserve. There was no provision in the Act analogous to Article III. The exclusive right to use that shore and intervening waters was essential to a recognized developing commercial industry and the primary means of subsistence from the adjacent fishery. 248 U.S. at pages 88-9.

By contrast, in this case the language of the Executive Order of 1857 on which the Puyallup Tribe relies is a mere reference to a diagram which showed the river in and out

of the proposed reserve along with other geographic markes naturally appearing on such a map. That order does not permit an inference such as that drawn in the Alaska Pacific Fisheries case, nor is such an inference supported by circumstances pointing to particular dependence upon the land below the high-water mark in issue.

This court in Montana held the treaties with the Crow Tribe setting apart certain land bounded by the Yellowstone River for their undisturbed use and occupation did not, by mere reference to exclusive use of a general area, express any intention to grant the banks of the river with sufficient clarity to overcome the Holt State Bank presumption. 450 U.S. at page 543-544. The court then went on to state an alternative ground for its holding, which the 9th Circuit has apparently taken in this case to be the only ground, the absence of public exigency requiring such a grant.

In Shively vs. Bowlby, supra, the court did note that historically a public exigency was required for Congress to depart from its policy of reserving ownership of beds under navigable waters for the future states. 152 U.S. at page 48. The Montana opinion, at 450 U.S. 556, notes the absence of any such public exigency and cites the Alaska Pacific Fisheries case as an instance where such an exigency was presented and the Skokomish case as an instance where such an exigency was absent.

The 9th Circuit's opinions in this case and in the companion case, Muckleshoot Tribe vs. Transcanada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983), Petition for Certiorari pending as No. 83-833, express the clear holding, contrary to Montana, that no express reference to the bed beneath navigable waters is necessary to find such a grant in the

designation of a reservation. The court held

> Where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.
>
> Opinion at pages 15-16, quoted and followed in Muckleshoot at 717 F.2d at 458.

The citation in Montana of the Alaska Pacific Fisheries and Skokomish cases to illustrate the presence and absence of such an exigency as discussed in Shively was misinterpreted by the Court of Appeals to state an alternative holding which simply was not present in this court's opinion.

Montana was a negative holding. A conveyance of land around a navigable waterway to a tribe would not be construed to include the bed of that waterway if there was no express grant and there was no public

exigency which in the circumstances required the inference of intent to grant the bed of the waterway along with the land around it. Montana did not hold that the rest of the treaty language may be ignored in determining whether such an inference was necessary.

Montana did not suggest that such an implication would be permitted where the exigency relied on, such as dependence on the fishery, was expressly addressed by a separate grant such as Article III of the Treaty of Medicine Creek. On the contrary, the court in Montana carefully examined the prior history of treaties between the Crow Indians and the United States in addition to the recognized needs of the Indians which the subject treaty might be presumed to concern. This teaching by example in Montana was ignored by the courts below.

The Court of Appeals holding in the case will require courts in this circuit in the future to disregard such vital circumstances

importance of the bed, as distinguished from the waterway generally.

The State of Washington has conveyed title to land below the high-water mark, both tidal and non-tidal, in reliance upon the holding of Holt State Bank that the designation of a reservation does not include a grant of land below the high-water line unless specific reference to that land is made. In Montana, this court reaffirmed Holt State Bank as a rule of property. This court should grant certiorari and reverse the Court of Appeals in order to preserve that rule of property and protect the rights of parties relying on it.

> Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change.
>
> Minnesota Mining Co. vs. National Mining Co., 3 Wall 332, 334, 18 L.Ed. 42, cited in United States vs. Title Insurance and Trust Company, 265 U.S. 472, 486 (1924).

II. The promise of a reservation "on the Puyallup" does not indicate an intent to grant to the tribe the bed of that watercourse.

As evidence of the government's intent to convey the riverbed, the Court of Appeals and trial court cited evidence of statements by the representatives of the Tribe and Governor Stevens at the conference held at Fox Island in 1856. That conference followed the end of brief hostilities between the Puyallup and other tribes and non-Indian settlers in that and the previous year. (The minutes appear as Plaintiffs Ex. 3, Supp. Exc. of Record pp. 4-6.) Members of the tribe expressed to Governor Stevens their wish "to have a reservation on the Puyallup." Governor Stevens promised that they should "have . . . one large reservation on the Puyaloop [sic]." Court of Appeals Opinion at 18, citing the trial court at 525 F.Supp. 65, 728 (W.D.Wash. 1981) [Finding of Fact 13, Exc. of Record at page 18].

The Puyallup Tribe's desire and the governor's promise expressed at Fox Island relate to the river and the size of the reserve. Those statements cannot rationally be read to be a direct request for or promise of title to the bed of the Puyallup River, as distinguished from access to it, in view of the prior property rights in the river expressly granted to the Tribe by Article III as interpreted generally in Winans and Washington vs. Fishing Vessell Association and specifically with reference to this Tribe and this river in the Puyallup Tribe vs. Washington State Game Department cases.

There was no dispute as to the relevant facts in the trial court. The Indians did depend on fish and many of their ceremonies and religious beliefs focused on the river. The river was a part of the accustomed grounds and stations to which the Tribe was guaranteed access and use in Article III of

the 1854 treaty. United States vs. State of Washington, 384 F.Supp. 312, 371 (W.D. Wash. 1974) (Finding of Fact 99). They built fish traps and weirs on the riverbanks and bed of the Puyallup River, but these structures were swept away by the spring tides and rebuilt each year. (Finding of Fact 17, Exc. of Record p. 17.) After the treaty, the Tribe, along with many other Tribes in Western Washington, engaged in sporadic hostilities for about a year with non-Indian settlers, which had many causes, of which one was dissatisfaction with their original smaller reservation further south on Commencement Bay on rocky land apart from the river. (Finding of Fact 11, Exc. of Record p. 18; P.T.O. Uncontested Fact 17, Exc. of Record p. 34.) The Fox Island Council followed at which the noted statements were made, the Commissioner of the Office of Indian Affairs received and forwarded with approval Governor Stevens' proposal for the enlargement of the reserve

on Commencement Bay and the President approved that proposal on the recommendation of the Secretary of the Interior January 20, 1857. (P.T.O. Uncontested Facts 18-24, Exc. of Record p. 35-8.)

> The principal fishing places of the Puyallup Indians were located in the area ceded by these Indians under the Medicine Creek Treaty as well as the area subsequently set aside pursuant to the treaty for their exclusive use as the Puyallup Indian Reservation. The land set apart as the Puyallup Reservation as a result of Governor Stevens' 1856 recommendation for relocation of the reservation also was intended to encompass usual and accustomed freshwater fishing sites, and to provide access to traditional fisheries in Commencement Bay for those Indians who were brought to the reservation.
>
> United States vs. State of Washington, supra, (Finding of Fact 98).

These undisputed facts do not support any finding that Governor Stevens even obliquely promised (or that the President, in approving Governor Stevens' proposed reservation, expressed) a further grant to

the Puyallup Tribe of property rights in the riverbed specifically to protect their right to fish in it, as distinguished from enlarging the area of their reservation and placing that reservation around the river which was their traditional home.

III. Article III of the Treaty of Medicine Creek is an express grant of property rights in the Puyallup Riverbed.

In Article III of the Treaty of Medicine Creek, the government had given this Tribe a property right in the banks of the Puyallup river, along with other traditional fishing grounds, to have access to the fishery resource there. Puyallup Tribe vs. Washington State Game Department cases, supra; United States vs. Winans, 198 U.S. 371 (1904). That treaty right was recognized as a grant of a property right meeting the test of the presumption against such pre-statehood grants of rights below the high-water mark

along navigable waters established in Shively vs. Bowlby, supra. The court stated that the extinguishment of Indian title in exchange for, inter alia, the right of taking fish at all usual and accustomed places, was a public purpose for which the Federal government could make such a grant and that in the treaty provision such a grant had been expressly made. 198 U.S. at 381.

The right to take fish and the right of access to traditional fishing grounds are not so essential to the bundle of rights known as fee title that they cannot be severed from fee title in a riverbed (the ability of the Tribe to make other uses of the river follow as an incident of the federal right of navigation). In this case, those rights were severed and granted to the Puyallup Tribe by Article III of the Treaty of Medicine Creek and the Tribe's use of those rights, along with all of its other uses of the Puyallup

River, were made convenient by placing the reservation around the river. The exigency relied on by the courts below, the requirement of meeting the Tribe's needs to the river, were thereby completely met and the limited property rights in the river necessary to meet it were completely severed from the remaining fee title to the bed. In these circumstances, the Executive Order cannot be read to express an intent contrary to the treaty which it implemented. The treaty and the Executive Order of 1857, read together, plainly withhold a grant to the Puyallup Tribe of fee title to the bed of this navigable waterway and reserve that bed for the future State of Washington in accord with the historical practice of the United States.

CONCLUSION

For the foregoing reasons, amicus curiae requests that a Writ of Certiorari be issued

to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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